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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 874

GENEVA R. MARSHALL,
Petitioner,

v.

ELVIE RUSSELL, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, et al.,
Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Georgia.

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* Other Respondents are: EVERETT RUSSELL, RUTH RUSSELL HOWARD and OLIVER O. RUSSELL.

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INDEX.

	Page
Prayer	1
Citations to opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	10
Appendix A—Ga. Code, Section 110-706	11
Appendix B—Decision of the Supreme Court of Georgia	12

Cases Cited.

Burke v. The State, 205 Ga. Reports 656, 659	6
Mooney v. Holohan, 294 U. S. 103 (55 Supreme Court 340, 79 Lawyers Edition 791, 98 A. L. R. 406)	6
Napue v. Illinois, 360 U. S. 264 (3 Lawyers Edition 2, 1217, 79 Supreme Court 1173)	8
New York ex rel. Whitman v. Wilson, 318 U. S. 688 (63 Supreme Court 840, 87 Lawyers Edition 1083)	6
Pyle v. Kansas, 317 U. S. 213 (63 Supreme Court 177, 8887 Lawyers Edition 214)	6
Smith v. United States, 259 Federal 2nd 125	9
White v. Ragen, 324 U. S. 760 (65 Supreme Court 978, 89 Lawyers Edition 1348)	6

Statutes Cited.

Constitution of the United States, Amendment 14	2, 5, 6, 9
Ga. Code, Section 110-706	2, 4, 5, 7, 8
28 U. S. C. 1257 (3)	2

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Georgia.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of The State of Georgia entered on the 9th day of September, 1966, and in which a timely motion for rehearing was filed by Petitioner and in which a rehearing was denied by the Supreme Court of Georgia on September 22, 1966.

* Other Respondents are: EVERETT RUSSELL, RUTH RUSSELL HOWARD and OLIVER O. RUSSELL.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Georgia is unreported as of the date of the filing of this petition for a writ of certiorari and is printed in Appendix B hereto, infra, p. 12. The opinion of the Supreme Court denying the rehearing is printed in Appendix B hereto, infra, p. 12. The opinion of the Supreme Court of Georgia is identified as Case No. 23576.

JURISDICTION.

The judgment of the Supreme Court of Georgia in the original decision was entered on September 9, 1966, and rehearing was denied on September 22, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

Whether a state requirement that a judgment obtained by perjury can be set aside only unless the person charged with perjury shall have been duly convicted and unless it shall appear that the judgment could not have been obtained and entered up without the evidence of the perjured testimony offends the due process clause of the 14th Amendment of the Federal Constitution of perjury as a condition precedent to the setting aside of a judgment obtained by perjury.

STATUTE INVOLVED.

The statutory provisions involved are Ga. Code, Section 110-706, and the Due Process and Equal Protection Clause of the Constitution of the United States. Ga. Code, Section 110-706, is printed in Appendix A, infra, p. 11.

STATEMENT.

Petitioner filed her petition in the Superior Court of Burke County, Georgia, against Respondents seeking an accounting between the parties, as heirs of Q. V. Russell, deceased, and seeking to set aside the probate of the Last Will and Testament of Q. V. Russell and declaring an intestacy as to the death and the estate of Q. V. Russell, because of the alleged obtaining of the probate of the joint Will in solemn form on the basis of perjured testimony. Petitioner alleged a lack of knowledge of the defective probate of the Will until January, 1966. Petitioner, among other grounds, alleged that the proceedings and judgment of probate obtained in solemn form be declared void as depriving Petitioner of her property without due process of law and as violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment of the Constitution of the United States (Record p. 11). The defendants filed their demurrers to the petition and the trial court on May 20, 1966, sustained the demurrers and dismissed the plainiff's petition. On May 21, 1966, Petitioner filed her notice of appeal to the Supreme Court of Georgia and the same was docketed in the Supreme Court of Georgia on May 25, 1966. In the enumeration of errors in the Supreme Court (Enumeration of Error No. 5) (Record p. 62) Petitioner enumerated as error the lower court's dismissing the petition on the grounds that it did not set forth any cause of action, because the judgment of probate could not have been entered up without the evidence of witnesses to the Will and in that it did not appear that those persons alleged to have committed perjury had been duly convicted of perjury as charged against them by the allegations of Plaintiff's petition. The Federal Constitutional issue was clearly presented in the trial court by the pleadings and in the Supreme Court of Georgia by the enumeration of errors and the issues presented for decision

in the Supreme Court of Georgia in that at each stage it was alleged that the judgment of probate in solemn form was void as depriving Petitioner of her property without due process of law contrary to due process of law and violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment of the Constitution of the United States for enumerated reasons.

The Supreme Court in headnote two of the decision held, "The allegations of Plaintiff's petition are insufficient to show that the judgment of probate was procured by fraud on the Court of Ordinary through perjured testimony where there is no allegation that those charged with perjury have been indicted and convicted of such offense." Further in division two of the opinion (Record p. 75, App. B., p. 12) the Supreme Court said, ". . . Though a judgment obtained as a consequence of corrupt and wilful perjury may be set aside, before it can be done, it must be shown that the person charged with such perjury has been convicted thereof. Ga. Code, § 110-706.

The trial court, in dealing with Petitioner's petition to protect her interest in the estate of her father, Q. V. Russell, deceased, sustained the demurrers of Respondents notwithstanding the allegations of the petition as to facts and circumstances which, if proved, would show conclusively that the judgment of probate in solemn form of the joint Will of Petitioner's father was null and void. The petition alleged facts that would show a course of conduct from the death of Petitioner's father such as to deprive Petitioner of her property and rights as an heir of her father. The petition alleged the discovery of the evidence that would prove that the probate in solemn form was void and which, if proved, would result in Petitioner's right and interest in the estate of her father being protected. As the case now stands, and unless certiorari is granted by this Court, this Petitioner will be deprived of her right and of her property because of the applica-

tion of Ga. Code, § 110-706, which requires that before a judgment can be set aside on the grounds that it was obtained by perjury that it must be shown that the person charged with such perjury has been convicted thereof.

The decision of the Supreme Court of Georgia was entered on September 9, 1966, and a timely motion for rehearing was filed by your Petitioner and one of the grounds enumerated in the petition for rehearing was that the judgment of probate in solemn form was void as depriving the Plaintiff of her property without due process of law and as violating and denying to Petitioner due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

The Federal question as to the rights protected under the 14th Amendment of the Constitution of the United States clearly appear in the petition, in the Appeal to the Supreme Court of Georgia; in the decision of the Supreme Court of Georgia; and in the Motion for Rehearing.

Rehearing was denied by the Supreme Court of Georgia on September 22, 1966, and Petitioner now seeks the writ of certiorari to review the decisions of the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Georgia below applying Ga. Code, § 110-706, denies Petitioner of her property in that the Ga. Code, § 110-706, as applied, denies to this Petitioner her property without due process of law in that said Code Section, as applied, requiring that the judgment obtained by perjury cannot be set aside unless the person charged with the perjury shall have been convicted. The Georgia Code Section, while purporting to grant authority for the setting aside of a judgment obtained on perjured testimony, imposes a condition

of setting aside the judgment that is impossible and unreasonable and arbitrary.

The Supreme Court of Georgia in the case of **Burke v. The State**, 205 Ga. Reports, 656, 659, recognized the decisions of this Court in **Mooney v. Holohan**, 294 U. S. 103 (55 Supreme Court 340, 79 Lawyers Edition 791, 98 A. L. R. 406); **Pyle v. Kansas**, 317 U. S. 213 (63 Supreme Court 177, 8887 Lawyers Edition 214); **New York ex rel. Whitman v. Wilson**, 318 U. S. 688 (63 Supreme Court 840, 87 Lawyers Edition 1083); and **White v. Ragen**, 324 U. S. 760 (65 Supreme Court 978, 89 Lawyers Edition 1348), that where it is shown that a conviction was procurred by perjured testimony, with testimony known to be perjured at the time, there was a denial of due process as guaranteed by the 14th Amendment. On several occasions the question of reviewing a conviction of a person convicted with perjured testimony has been before the Supreme Court of Georgia, but in each instance that Court has consistently held that a judgment obtained by perjury could be set aside on such grounds only unless the person charged with perjury had been convicted and further added the requirement of the Code Section that it must be shown that the judgment could not have been obtained except by the testimony of the perjured person. The Georgia Supreme Court has on many occasions wrestled with the application of the requirement of the conviction for perjury and has recognized the burden that is placed upon a person seeking to satisfy the judgment obtained by perjury. This requirement, on its face, of the conviction of a person giving the perjured testimony, places such a burden upon the person affected by the judgment that it is impossible, unreasonable and contrary to the every concept of the due process of law.

The difficulty of convicting a person of perjury after the lapse of several years is most difficult, if not impossible. In the case sub judice, the judgment of probate was ob-

tained at a time when all of the heirs were in agreement and the petition shows on its fact that a course of conduct was followed treating all of the heirs as equal participants in the estate of the father and husband. The petition alleges that the perjury in obtaining the judgment was not known until January of 1966 and the record shows that Petitioner filed her petition within a very short time after the discovery of the perjury. The demurrer raised the question that an attack on the judgment of probate was too late in that the probate had occurred more than three years after the date of the alleged void judgment and that notwithstanding the perjury, that it could not be attacked for the reason that the petition did not allege the conviction of the alleged perjurers as required by the Ga. Code, § 110-706.

That judgments obtained by perjury should not be allowed to stand goes without question. The object of all legal investigation being to ascertain the truth, there is no reason, under any theory of law, to deny a person property or rights under our Constitution because that person is unable to or has not procured the conviction of another person for a crime. To impose such a restriction is to impose upon a citizen a requirement that he not only show a right but in addition thereto must show that he has taken upon himself or caused to be prosecuted in a separate proceeding and in a proceeding in which, at most, he could be a prosecutor, and require the force of the State, in obtaining a conviction for perjury. The rules of evidence applicable in a perjury proceeding are different in that in such a proceeding it would be necessary for a citizen to prove beyond a reasonable doubt the perjury of another person that the citizen would not of necessity have any knowledge of. Even then, a jury of twelve could, for any reason that they desire, find the person charged with perjury innocent, notwithstanding the evidence produced by the citizen claiming a right con-

ditioned upon the conviction of another for a crime. To state the proposition shows the impossibility of accomplishing a conviction and complying with the requirements of the Georgia Code Section for the purpose of obtaining a right that is placed in jeopardy by a judgment obtained by perjury.

Too, the question presented is of importance not only to the Petitioner in this case but is important to every person asserting a right as a citizen. The reasoning is applicable not only in Civil cases but in criminal cases as well in that the Georgia Code Section applies equally to civil and criminal proceedings. It is interesting to note that in the cases adjudicated by the appellate courts of Georgia under Code § 110-706, that while the right to set aside a judgment obtained by perjury has been clearly recognized, that a careful search has failed to disclose any judgment that has been set aside. Clearly the rights of the citizen should not be predicated upon nor conditioned upon his conviction or causing the conviction of another person for a crime.

That the use of false testimony to obtain a judgment is prohibited is set forth in **Napue v. Illinois**, 360 U. S. 264 (3 Lawyers Edition 2, 1217, 79 Supreme Court 1173). While dealing with a criminal case, the reasoning is applicable in a civil proceeding in that due process is guaranteed in both criminal and civil proceedings. In this case the Petitioner was denied the right to even present her evidence as to the fact that the judgment of probate was obtained by perjured testimony in that applying Georgia Code, § 110-706 the Court ruled that the petition should be dismissed on demurrer notwithstanding the allegations therein of the obtaining of the judgment by perjury. Petitioner was denied the right to prove her allegations of perjury and to prove and assert her right in a Court of law as set forth in her sworn petition in equity. That petitioner should have the right to prove her alle-

gations under the due process clause of the 14th Amendment Petitioner and was at least entitled to have her day in Court to prove her allegations of perjury was recognized in **Smith v. United States,** 259 Federal 2nd 125.

Under the record of this case, where the Petitioner alleges that the relief prayed for should be granted for the reasons:

a) The Will was a joint Will that was not executed in compliance with legal requirements;

b) The Will was not properly witnessed;

c) No evidence to support judgment of probate;

d) Affidavits recited to support probate not valid as no oath administered;

e) Judgment of probate obtained by fraud with knowledge of attorney for propounder that probate was obtained contrary to law;

f) Knowledge of truth surrounding probate of Will not discovered until after statute of limitations had expired;

g) Petitioner cannot convict perjurers in that statute of limitations had expired upon discovery of truth by Petitioner;

h) Petitioner denied due process of law in proving her right to prove her allegations as alleged

it is submitted that the writ of certiorari should be granted to protect the rights of Petitioner.

It is basic that a person is entitled to at least have an opportunity to prove the allegations where such allegations, if supported, would support and authorize and protect a right of the citizen protected by the 14th Amendment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

This 30th day of November, 1966.

Respectfully submitted:

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APPENDIX.

Appendix A.

110-706. (5961) Judgments obtained by perjury.—Any judgment, verdict, rule, or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury; and it shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually set aside (Act 1833, Cobb, 804).

Appendix B.

IN THE SUPREME COURT OF GEORGIA.

Decided Sep. 9, 1966.

23576.

Marshall v. Russell, Executrix, et al.

1. Where a judgment of the court of ordinary shows on its fact that there was jurisdiction of the parties and subject matter of a probate proceeding, the law presumes that the court did all that the law requires in admitting the will to probate.

2. The allegations in plaintiff's petition are insufficient to show that the judgment of probate was procured by fraud on the court of ordinary through perjured testimony where there is no allegation that those charged with perjury have been indicted and convicted of such offense.

3. Where plaintiff's petition fails to allege any diligence in discovering facts which she now alleges entitle her to have a judgment of the court of ordinary set aside and no reason is given why such facts were not discovered during the probate hearing and the seven years after said judgment was rendered, nothing is alleged to toll the statute of limitation, and the court did not err in dismissing plaintiff's petition on general demurrer.

Argued July 11, 1966. Decided September 9, 1966. Rehearing denied September 22, 1966.

Equitable petition. Burke Superior Court. Before Judge Kennedy.

Thurmond, Hester, Jolles & McElmurray, Cornelius B. Thurmond, Jr., Thomas M. Odom, for appellant.

George W. Fryhofer, R. N. Harden, Fulcher, Fulcher, Hagler, Harper & Reed, E. D. Fulcher, Cumming, Nixon, Eve, Waller & Capers, John D. Capers, for appellee.

Almand, Justice. This appeal is from an order sustaining the general demurrers to a five-count petition. The general allegations of all the counts are the same. They are: Q. V. Russell, the father of the plaintiff and appellant, procured the preparation of a mutual will for himself and his wife Elvie Russell, one of the defendants, on August 20, 1946; said mutual will was the result of an agreement between the husband and wife that "it should constitute a contract creating a remainder estate for the children named therein which said agreement and contract could not be changed by either one of them after the death of the first of them and under which the survivor of them would equally divide the estate among their said children, share and share alike"; Q. V. Russell died on June 26, 1959; Elvie Russell presented the purported will for probate in common form on July 6, 1959, and subsequently presented the will for probate in solemn form. Attached to the petition as exhibits were copies of, (1) the proceeding for probate in common form, (2) the purported will, and (3) the proceeding for probate in solemn form.

The mutual will provided that the survivor should receive all the properties of the party dying first and named the survivor as sole executor. The will shows that it was executed by both parties in the presence of three named witnesses on August 20, 1946, and duly attested by three witnesses. The petition for probate in solemn form named the four children and the surviving wife, all of whom waived all service, citation and process and agreed "that said proceeding to probate in solemn form may be instanter or at any time".

The record contains an affidavit sworn and subscribed to before the Ordinary of Burke County, by E. L. Smith

and W. M. Phillippe, dated August 15, 1959, in which they swore that the will of the testator was signed by him in their presence and they subscribed their names as witnesses in his presence. Also dated the same day is the affidavit of Elvie Russell, sworn to before the ordinary in which she swore the will was signed by her and by the testator in the presence of each other and the three witnesses, and that the third witness, Delia Holley, is now a resident of the State of Tennessee. On August 15, 1959, the ordinary in an order reciting that "it appearing to the satisfaction of this court by the testimony of the witnesses to this will, E. L. Smith and W. M. Phillippe, Jr., that this paper is the last will and testament of Quiller V. Russell and that he was competent to make a will at the time he signed and executed the same," the will was admitted to record. Letters testamentary reciting that the will was legally proved in solemn form on August 15, 1959, were issued to Elvie Russell.

On March 5, 1966, Geneva R. Marshall filed her petition naming as defendants Elvie Russell, individually and in her representative capacity as executrix of the estate of Q. V. Russell, and the three surviving children of the testator. It was prayed, among other things, that the judgment of the court of ordinary dated August 15, 1959, probating the last will and testament of Q. V. Russell in solemn form be declared null and void. It was alleged that Delia Holley signed her name as a witness before either the testator or his wife signed and not in the presence of the other witnesses; that witness Phillippe did not subscribe his name in the presence of the other witnesses; and that the testator did not sign his name in the presence of witness Smith.

The petition also alleged that at the time the appellant's signature was procured by her mother for probate in solemn form she "represented to plaintiff [appellant] that the said purported mutual will, a copy of which is hereto

attached as Exhibit C, was the result of the prior agreement and contract hereinbefore alleged made prior to the execution of the said purported will and under which the said Q. V. Russell and the defendant Mrs. Elvie Russell agreed to distribute the estate to each of their four (4) children hereinabove alleged on an equal basis, share and share alike. That in reliance upon such statement, which statement was made by defendant Mrs. Elvie Russell to plaintiff and in the presence of the attorney for Mrs. Elvie Russell, individually and as executrix, the said Carlton G. Mathews, Jr., the said plaintiff affixed her signature to the waiver of service to the application for the probate in solemn form. That from the time of the probate of said purported will in solemn form on the 15th day of August, 1959, the said defendant Mrs. Elvie Russell did attempt to and did carry out the agreement made between her and the said Q. V. Russell in that the said defendant Mrs. Elvie Russell divided the estate equally among the four (4) children up until or about the 27th day of July, 1964, at which time the said defendant Mrs. Elvie Russell filed action in Burke County Superior Court, being Case Number 570, in which she sought to have the said purported last will and testament of the said Q. V. Russell construed." Plaintiff alleged that she did not discover until January 3, 1966, from one of the witnesses to the will that the will was not properly executed.

The several counts alleged that the judgment of probate in solemn form was void because, (a) it was not witnessed legally, (b) there was no showing that the mutual will had not been revoked by Elvie Russell, (c) the said probate was procured by the fraud of Elvie Russell on the court of ordinary in that she knew the will had not been properly executed and she concealed this fact from the court, and (d) the affidavits of the witnesses Smith and Phillippe did not constitute legal testimony in the proof of the execution of the will.

Among the grounds of the general demurrer which the court sustained were, (a) the action was barred by the statute of limitation (**Code**, § 3-702), (b) the plaintiff had failed to exercise diligence required by law for the discovery of facts upon which she bases her claim for relief, and (c) "because said petition in its entirety and said counts separately do not set forth any cause of action against this defendant because the judgment of the court of ordinary ordering to probate in solemn form the will of Q. V. Russell on August 15, 1959, could not have been entered up without the evidence of E. L. Smith, W. M. Phillippe, Jr., and Mrs. Elvie Russell, and it does not appear that these persons, charged with perjury by the allegations of the petition, have been thereof duly convicted." We are of the opinion that all of these grounds were well taken.

1. The judgment of the court of ordinary probating the will of Q. V. Russell in solemn form shows on its face that the court had jurisdiction of the parties and subject matter. The authority to act being shown, the law presumes that the court of ordinary in admitting the will to record did all that the law requires to be done, and the superior court in a collateral proceeding will not go behind that judgment. **Clements v. Henderson**, 4 Ga. 148, 154 (48 AD 210); **McDade v. Burch**, 7 Ga. 559, 562 (50 AD 407); **Davie v. McDaniel**, 47 Ga. 195 (1, 2). "The court of ordinary is a court of general jurisdiction, and therefore it is presumed in favor of one of its judgments that every fact necessary to make it valid and binding upon the parties thereto and their privies was before the court." **Stuckey v. Watkins**, 112 Ga. 268 (1) (37 S. E. 401). "In the absence of a statute requiring it, judgments of courts of general jurisdiction of the subject matter and the parties need not have set forth therein the evidence upon which they are based." **McFarland v. McFarland**, 143 Ga. 598 (2) (85 S. E. 758).

2. The allegations of the petition are insufficient to show that any fraud was practiced upon the appellant by her mother, Elvie Russell, at the time appellant acknowledged service and signed the waiver in the probate of the will in solemn form. Appellant's mother, under the allegations of the petition, did nothing to prevent or deter anyone from caveating the will in 1959 when it was offered for probate.

The chief allegation of fraud is that the mother knew that the will had not been properly executed and silently permitted witnesses Smith and Phillippe to falsely swear and that she falsely swore as to its execution, and therefore the mother committed fraud on the court of ordinary in leading the court to render a judgment on false testimony. Though a judgment obtained as a consequence of corrupt and wilful perjury may be set aside, before it can be done, it must be shown that the person charged with such perjury has been convicted thereof. **Code**, § 110-706. Compare **Bird v. Smith**, 186 Ga. 301 (2, 3) (197 S. E. 642), where it was held: "An allegation in a petition, that the defendants 'falsely represented to the court of ordinary that the testator was seventy-nine years old when he executed said will, that he had suffered a stroke of paralysis a short time before executing his will, and that testator at the time he signed said will did not possess sufficient mental capacity to make a will, and by said false and fradulent representation did obtain a judgment in the court of ordinary sustaining the caveat, and that said judgment was obtained through fraud perpetrated upon the plaintiff', is an allegation that the judgment complained of was obtained by reason of perjured testimony given by the defendants. The instant case being a petition to have set aside the judgment of the court of ordinary, under the allegation above quoted, which we have held to be an allegation that the judgment was obtained by reason of perjured testimony, and there being no alle-

gation that the defendants, who are alleged to have testified falsely, have been indicted and convicted, a general demurrer to the petition should have been sustained. **Elliott v. Marshall**, 182 Ga. 513 (185 SE 831), and cit."

3. "The judgment of a court of competent jurisdiction may be set aside by a decree in equity, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant." **Code** § 110-710. "All proceedings of every kind in any court of this State to set aside judgments or decrees of the courts, shall be made within three years from the rendering of said judgments or decrees." **Code** § 3-702. "Where it was sought to have the court of ordinary revoke and set aside the probate of a will in solemn form, on the petition of one who had been served and was a party to the proceedings to admit the will to probate, such application should have been made within three years from the rendering of the judgment sought to be vacated." **Speer v. Speer**, 74 Ga. 179 (1).

The case of **Hightower v. Williams**, 104 Ga. 608 (30 S. E. 862), on its facts is nearly identical with the factual situation here. There one of the heirs of the testator sought to set aside in the court of ordinary the probate of the will in solemn form. He alleged in his petition "that the testator was induced by undue influence to sign the will; that the will was not properly attested; that certain of the subscribing witnesses did not see the will signed by the testator and did not sign it in his presence; that the judgment of probate was obtained by fraud of the sole legatee and of her attorney; and that these facts were unknown to petitioners until after the judgment and until a few days before the filing of the present petition." Id., p. 609. In holding that the court did not err in directing a verdict for the defendant, this court in an unanimous opinion said: "These plaintiffs in error were served with notice of the intention of the executor to

probate the will in solemn form at a certain time and place. They failed to appear and file a caveat to the proceeding. They now seek to set aside the judgment of the court of ordinary, by attempting to prove the facts set out in their petition; but one of the main facts necessary to establish in a proceeding to set aside the judgment, they neither allege nor attempt to prove. They do not allege or attempt to show any diligence on their part to discover, before the judgment was rendered, the facts now recited in their petition. A judgment against a party may be set aside for proper cause; but he must always show, not only that the judgment was improperly granted, but that he did not, at the time it was granted, know of his defense, and could not have ascertained it by the exercise of proper diligence on his part. The plaintiffs here [illegible]ged in their petition and proved at the trial that, until a short time before they filed their petition, they did not know of the defense which they might have made to the probate of the will; but nowhere is it alleged or proved or attempted to be proved that, before the probate, they exercised any sort of diligence to discover the facts now set up. Had they, before the probate of the will, gone to the subscribing witnesses and the latter were truthful men, an inquiry of them as to the facts of the attestation of the will would have brought out the facts to which some of them now testify. It seems to us that the lowest degree of diligence would have required children who had been disinherited by their father to have seen the witnesses to his will and to have inquired about all the facts of its execution. This the petitioners did not do; nor do they attempt to explain their failure to do so. They did not even attend the court as they were summoned to do, and examine the witnesses to the will when the latter was before the court for probate. Had they done this they might, so far as the record discloses, have discovered the facts upon which they now rely to set aside the judgment. As before remarked, while the judg-

ment of a court may be set aside for proper cause, it will not be done if the party complaining does not show proper diligence in discovering or attempting to discover the facts upon which he relied to annul the judgment." Id., pp. 609, 610.

What the court said in the **Hightower** case, 104 Ga. 608, supra, as to the failure of the moving party to use the slightest degree of diligence, is applicable here. Appellant was made a party to the proceeding to probate the will of her father on August 1, 1959. The facts upon which she bases her claim that such probate judgment be set aside could have been ascertained by her own diligence. In her petition she alleged that it was not until January 3, 1966, that she discovered and learned from W. M. Phillippe, Jr., that the will was not properly executed by either Q. V. Russell or Elvie Russell. No reason is given why she could not have ascertained these facts on the probate hearing or during the nearly seven years lapse of time after such hearing. "A petition seeking to set aside a judgment of the court of ordinary discharging an executor, brought 13 years after such discharge, which did not contain specific allegations of actual fraud on the part of the executor deterring and debarring the plaintiffs from sooner instituting the action so as to toll the statute of limitations, was subject to dismissal on general demurrer." **Warnock v. Warnock**, 206 Ga. 548 (1) (57 S. E. 2d 571).

It was not error to sustain the general demurrer and dismiss the petition.

Judgment affirmed. All the Justices concur.

INDEX.

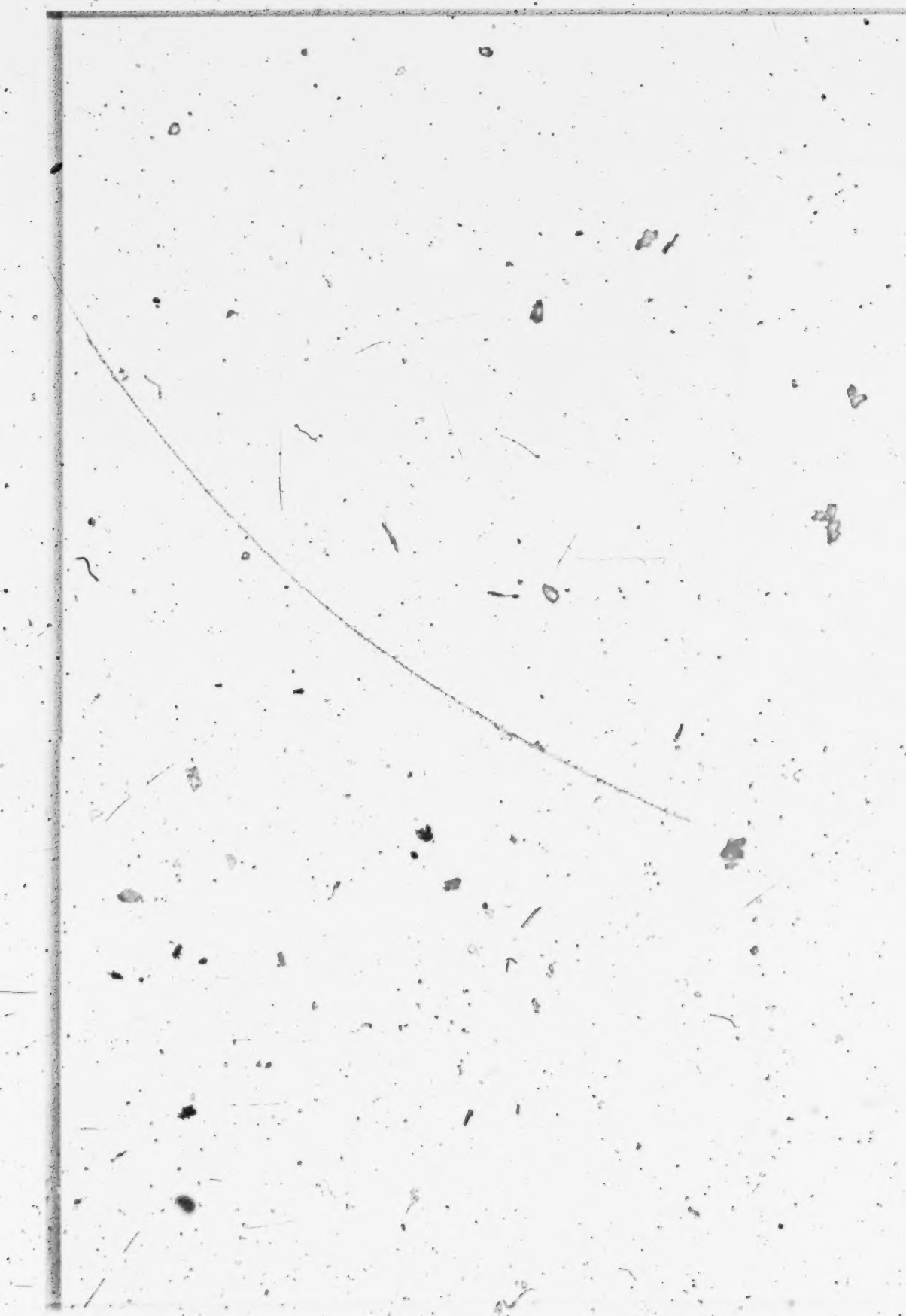
Page

PROCEEDINGS IN SUPERIOR COURT OF BURKE COUNTY.

Notice of appeal 1
Petition to set aside judgment 4
Order and rule ni si 45
Process 46
Sheriff's service 47
Defendant's general demurrers 48
Demurrer of Elvie Russell 49
Demurrers of defendants 52
Order sustaining demurrer 53
Order sustaining demurrers 54

PROCEEDINGS IN SUPREME COURT OF GEORGIA.

Notice of appeal and transcript of record 56
Enumeration of errors 56
Decision of court 60
Judgment 68
Motion for rehearing by appellant 69
Order denying motion for rehearing 93



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

GENEVA R. MARSHALL,
Petitioner,

v.

ELVIE RUSSELL, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, et al.,
Respondents.*

Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia.

TRANSCRIPT OF RECORD

of

Superior Court of Burke County, Georgia,

and

The Supreme Court of Georgia.

Georgia, Burke County.

In the Superior Court of Burke County, Georgia.

Geneva R. Marshall,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

Case No. 778.

NOTICE OF APPEAL.

Notice is hereby given that Geneva R. Marshall, plaintiff above named, does hereby appeal to the Supreme

* Other Respondents are: EVERETT RUSSELL, RUTH RUSSELL HOWARD and OLIVER O. RUSSELL.

Court of Georgia from the rulings on the demurrers entered in this action on the 20th day of May, 1966, said orders sustaining general demurrers of Elvie Russell, individually; Elvie Russell in her representative capacity as executrix of the Estate of Q. V. Russell, deceased; Ruth Russell Howard; Everett Russell; and dismissing the petition of plaintiff.

The Clerk will please omit the following from the record on appeal:

1. Special demurrer of Elvie Russell, in her representative capacity as executrix of the Estate of Q. V. Russell, deceased.

2. Answer of Elvie Russell, individually.

3. Answer of Elvie Russell, in her representative capacity as executrix of the Estate of Q. V. Russell, deceased.

4. Answer of Everett Russell.

5. Answer of Ruth Russell Howard.

6. Answer of Oliver O. Russell.

Transcript of evidence and proceedings will not be filed for inclusion in the record on appeal.

This 21st day of May, 1966.

Thurmond, Hester, Jolles & McElmurray,
By: /s/ C. B. Thurmond,
C. B. Thurmond,
Attorney for Plaintiff,
Southern Finance Bldg.,
Augusta, Georgia.

/s/ Thomas M. Odom,
Thomas M. Odom,
Attorney for Plaintiff.
P. O. Box 928,
Millen, Georgia.

Georgia, Burke County.

In the Superior Court of Burke County, Georgia.

Geneva R. Marshall,

vs.

Elvie Russell, Individuall and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

Case No. 778.

Certificate of Service.

I, Thomas M. Odom, Attorney of Record for Plaintiff, do hereby certify that I have placed in the United States Mail in properly addressed envelopes with sufficient placed thereon, a copy of this Notice of Appeal to the Attorneys of Record for Defendants consisting of Honorable George W. Fryhofer, Attorney at Law, Waynesboro, Georgia; R. U. Harden, Attorney at Law, Waynesboro, Georgia; Fulcher, Fulcher, Hagler, Harper and Reed, Attorneys at Law, 520 Greene Street, Augusta, Georgia, Attention Mr. Edward Fulcher; and, Cumming, Nixon, Eve, Waller and Capers, Attorneys at Law, 909 Marion Building, Augusta, Georgia, Attention Mr. John D. Capers; and the Honorable F. Frederick Kennedy, Judge of the Superior Court of Burke County, Georgia, Augusta, Georgia. The copies of Notice of Appeal are mailed to the Attorneys of Record for Defendants by United States Certified Mail, Return Receipt Requested.

This 21st day of May, 1966.

/s/ Thomas M. Odom,
Thomas M. Odom,
Attorney for Plaintiff,

P. O. Box 928,
Millen, Georgia.

In the Superior Court for Burke County, Georgia.

State of Georgia,
Burke County.

Geneva R. Marshall

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

PETITION TO SET ASIDE JUDGMENT.

Now comes the plaintiff, Geneva R. Marshall, and brings this her petition against Elvie Russell, Individually and in her representative capacity as Executrix of the Estate of Q. V. Russell, deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell, as defendants, and for grounds thereof respectfully shows to the Court:

Count I.

-1-

The defendants Everett Russell and Oliver O. Russell are residents of Burke County, Georgia.

-2-

The defendant Elvie Russell, individually and in her representative capacity as Executrix of the Estate of Q. V. Russell, receased, and Ruth Russell Howard are residents of Jefferson County, Georgia.

-3-

That Q. V. Russell died a resident of Burke County, Georgia, on the 26th day of June, 1959.

-4-

That the said Q. V. Russell left surviving him his widow, Elvie H. Russell, and four (4) children, Geneva R. Marshall, Oliver O. Russell, Ruth Russell Howard and Everett Russell.

-5-

That in the year 1946, the said Q. V. Russell procured the preparation of a paper intended to be the Mutual Will of he and his wife, the defendants Mrs. Elvie Russell, a copy of same being marked Exhibit "C", hereto attached and incorporated herein by reference.

-6-

That said Mutual Will was the result of an agreement between the said Q. V. Russell and his wife, the defendant Mrs. Elvie H. Russell, that it should constitute a contract creating a remainder estate for the children named therein which said agreement and contract could not be changed by either one of them after the death of the first of them and under which the survivor of them would equally divide the estate among their said children, share and share alike.

-7-

That the defendant Elvie Russell was a party to said agreement with her said husband and understood the said agreement as hereinabove alleged.

-8-

That pursuant to said agreement between the said Q. V. Russell and the defendant Mrs. Elvie Russell, the said Q. V. Russell procured the preparation of said purported Mutual Will.

-9-

That on or about the 20th day of August, 1946, and in reliance upon and in consideration of the said agreement,

the said Q. V. Russell embarked upon an attempt to have executed and witnessed the said paper to be the Mutual Will of him and defendant Elvie Russell.

-10-

That on or about the 20th day of August, 1946, W. M. Phillippe, Jr., drove the said Q. V. Russell to Waynesboro, Georgia, and then returned to Keysville, Georgia with the said paper.

-11-

That the said Q. V. Russell took the said paper into the kitchen of his home in Keysville, Georgia, got a drink of water from the sink and thereupon read the Will aloud to Mrs. Delia Holley (now Mrs. Delia Holley Cromwell) and requested that the said Mrs. Delia Holley be the first witness to the said paper purporting to be the Will.

-12-

That the said Mrs. Delia Holley, signed her name to the said paper on the said 20th day of August, 1946.

-13-

That at the time Mrs. Delia Holley signed her name to the paper, neither the said Q. V. Russell nor the said Mrs. Elvie Russell had signed the paper nor had the other two witnesses, W. M. Phillippe, Jr., and E. L. Smith, signed the paper and neither did the said Smith and Phillippe see Mrs. Delia Holley sign the paper nor did the said Phillippe and Smith sign in the presence of the said Mrs. Delia Holley nor did Q. V. Russell sign in the presence of or acknowledge his signature to the said Mrs. Delia Holley, nor did Mrs. Elvie Russell sign in the presence of or acknowledge her signature to Mrs. Delia Holley because both the said Q. V. Russell and the said Mrs. Elvie Russell signed the said paper at a time after the said paper was signed by Mrs. Delia Holley.

-14-

That on said 20th day of August, 1946, the said Q. V. Russell then took the said paper purporting to be his and his wife's Mutual Will to his store adjacent to his home, which said place was not in the presence of the said Mrs. Delia Holley and then procured the signature thereon as a witness the said W. M. Phillippe, Jr.

-15-

That the said W. M. Phillippe, Jr., signed his name to the said paper in the presence of the said Q. V. Russell only and not in the presence of Mrs. Elvie Russell or in the presence of Mrs. Delia Holley or in the presence of the witness E. L. Smith and at a time prior to the time that the signatures were placed thereon by the said Q. V. Russell and the said Mrs. Elvie Russell and the said Q. V. Russell and Mrs. Elvie Russell did not sign the paper in the presence of, or prior to the signature of the said W. M. Phillippe, Jr., or acknowledge their signatures to the said W. M. Phillippe, Jr.

-16-

Thereafter on the said 20th day of August, 1946, the said Q. V. Russell, in his store adjacent to his said house, procured the signature of E. L. Smith on the said paper purporting to be the Mutual Will of he and his wife.

-17-

That the said Q. V. Russell did not sign the paper as his Will prior to or in the presence of the witness E. L. Smith nor did he acknowledge any signature thereon as his signature to the said E. L. Smith.

-18-

That the defendant Mrs. Elvie Russell did not sign the paper purporting to be her Will prior to or in the presence

of the witness E. L. Smith nor did she ever acknowledge her signature to the said witness E. L. Smith.

-19-

That thereafter, the said Q. V. Russell died a resident of Burke County, Georgia, on the 26th day of June, 1959, as above alleged.

-20-

That thereafter, the purported Will of Q. V. Russell was offered for Probate in Common Form and was probated in Common Form on the 6th day of July, 1959, as shown by copy of proceedings, Order of Probate and Letters Testamentary hereto attached, marked Exhibit "A" and incorporated herein by reference.

-21-

That thereafter, the defendant Mrs. Elvie Russell proceeded to procure the Probate of said Will in Solemn Form.

-22-

That representing the said Mrs. Elvie Russell in the proceedings to Probate the said Will in both Common and Solemn Form was Carlton G. Matthews, Jr., an Attorney at Law, duly licensed to practice law in the State of Georgia and residing at Wrens, Jefferson County, Georgia.

-23-

That the said Carlton G. Matthews, Jr., represented the defendant Mrs. Elvie Russell both individually and in her representative capacity as the Executrix of the Estate of the said Q. V. Russell, deceased.

-24-

That in connection with the application to Probate in Solemn Form, a Waiver of Service, Citation and Process

was prepared and submitted to your plaintiff so that Letters Testamentary could issue without delay in term or in vacation.

-25-

That in connection with the procuring of your plaintiff's signature on said Waiver of Service and Consent, the defendant Mrs. Elvie Russell, individually and acting in her representative capacity as Executrix under the Letters Testamentary issued as the result of the Probate in Common Form, represented to plaintiff that the said purported Mutual Will, a copy of which is hereto attached as Exhibit "C", was the result of the prior agreement and contract hereinabove alleged made prior to the execution of the said purported Will and under which the said Q. V. Russell and the defendant Mrs. Elvie Russell agreed to distribute the estate to each of their four (4) chilren hereinabove alleged on an equal basis, share and share alike.

-26-

That in reliance upon such statement, which statement was made by defendant Mrs. Elvie Russell to plaintiff and in the presence of the attorney for Mrs. Elvie Russell, individually and as Executrix, the said Carlton G. Matthews, Jr., the said plaintiff affixed her signature to the Waiver of Service to the Application for the Probate in Solemn Form.

-27-

That thereafter, on the 15th day of August, 1959, the purported Mutual Will of the said Q. V. Russell was probated in Solemn Form in the Court of Ordinary of Burke County, Georgia, a copy of the proceedings therein, the Order of the Ordinary thereon and the Letter Testamentary being hereto attached, marked Exhibit "B" and incorporated herein by reference thereto.

-28-

That from the time of the probate of said purported Will in Solemn Form on the 15th day of August, 1959, the said defendant Mrs. Elvie Russell did attempt to and did carry out the agreement made between her and the said Q. V. Russell in that the said defendant Mrs. Elvie Russell divided the estate equally among the four (4) children up until on or about the 27th day of July, 1964, at which time the said defendant Mrs. Elvie Russell filed action in Burke County Superior Court, being Case Number 570, in which she sought to have the said purported Last Will and Testament of the said Q. V. Russell construed.

-29-

That on or about February, 1961, the said defendant Mrs. Elvie Russell did cause certain property owned by Q. V. Russell at the time of his death known as the McBean Place in Richmond County, Georgia to be plated into approximately equal shares or parcels with the intention of deeding equal shares or parcels to each of the four (4) children of she and the said Q. V. Russell and in accord with the said agreement and contract between her and the said Q. V. Russell hereinabove alleged and that this was prior to the time the said defendant Mrs. Elvie Russell repudiated the said agreement and contract on or about the 27th day of July, 1964 as above alleged, a copy of said plat is hereto attached, marked Exhibit "D" and incorporated herein by reference.

-30-

That in repudiation of the contract and agreement above alleged between her and the said Q. V. Russell, the said defendant Mrs. Elvie Russell did on or about the 29th day of May, 1964 have prepared and executed a deed of gift to defendant Everett Russell of Tracts Numbers 1-A and 2 of said McBean Place, the said deed being

filed for record in the Office of the Clerk of the Superior Court, Richmond County, Georgia on the 26th day of August, 1964, the same being recorded in Realty Book 30Q, page 768, a copy of the description of which is hereto attached, marked Exhibit "E" and incorporated herein by reference.

-31-

That in repudiation of the contract and agreement above alleged between her and the said Q. V. Russell, the said defendant Mrs. Elvie Russell did on or about the 29th day of May, 1964 have prepared and executed a deed of gift to defendant Ruth Russell Howard of Tracts Numbers 1-B, 3 and 4 of said McBean Place, the said deed being filed for record in the Office of the Clerk of the Superior Court, Richmond County, Georgia on the 26th day of August, 1964, the same being recorded in Realty Book 30Q, page 770, a copy of the description of which is hereto attached, marked Exhibit "F" and incorporated herein by reference.

-32-

That at the time the said witness Mrs. Delia Holley (now Mrs. Delia Holley Cromwell) executed her signature upon the purported Last Will and Testament of the said Q. V. Russell, the defendant Mrs. Elvie Russell knew that the signature of the said Mrs. Delia Holley was the first signature affixed to the said paper and was placed on it at a time prior to the time either she or Q. V. Russell signed the said paper as their purported Last Will and Testament.

-33-

That at the time of the probate of said purported Will of Q. V. Russell in common form, the said defendant Mrs. Elvie Russell and her attorney at law knew that the said paper purporting to be the Mutual Will of her and the said Q. V. Russell had not been executed with the for-

mality required by law and that said paper was in fact not valid as either the Mutual Will of Q. V. Russell and Mrs. Elvie Russell or the Will of the said Q. V. Russell, and that this constituted a fraud upon the Court of Ordinary or Burke County, Georgia and upon your plaintiff such as to make the Order of Probate of said Court in common form to be void.

-34-

That at the time of the proceeding to probate the said purported Will of the said Q. V. Russell in solemn form, the defendant Mrs. Elvie Russell and her attorney knew that the said paper had not been executed with the formality required by law and was in fact not valid as either the Mutual Will of the said Q. V. and Mrs. Elvie Russell or as the individual Will of Q. V. Russell, and that this was a fraud upon the Court of Ordinary of Burke County, Georgia and upon your plaintiff sufficient to make the probate of said purported Last Will and Testament void.

-35-

That the action of your plaintiff in executing the acknowledgement, waiver and assent to probate the purported Last Will and Testament of her father Q. V. Russell in solemn form which is contained as a part of Exhibit "B" hereto attached, was in reliance upon the representation by defendant Mrs. Elvie Russell to your plaintiff that said defendant Mrs. Elvie Russell would carry out the terms of the contract and agreement under which your plaintiff was a beneficiary, all as herein alleged, and that in consequence thereof, your plaintiff executed said assent and acknowledgement and by reason thereof has suffered detriment all as herein alleged.

-36-

That it was not until the 3rd day of January, 1966 that plaintiff discovered and learned from one of the witnesses

to the purported Last Will and Testament, Mr. W. M. Phillippe, Jr. that the Will was not properly executed as to either the said Q. V. Russell or the defendant Mrs. Elvie Russell.

-37-

That there were and are considerable properties in the Estate of the said Q. V. Russell consisting of lands and money now in the possession of the defendants and your plaintiff fears that the defendants will dispose of or encumber the said properties and money to the detriment of your plaintiff who is entitled to one-fifth (1/5) of the Estate of the said Q. V. Russell by virtue of the fact that the said Q. V. Russell died intestate because of the facts herein this petition alleged and that it is necessary for the Court sitting as a Court of Equity to intervene and restrain the disposition or encumbrance of said properties in order to protect the property rights of your plaintiff therein, a schedule of the lands which Q. V. Russell owned at the time of his death being attached as Exhibit "G" and incorporated herein, these in addition to those described in Exhibits "E" and "F".

-38-

That there are pending in the Superior Court of Burke County, Georgia, the following cases:

(a) Oliver O. Russell, vs. Elvie Russell, Individually and in Her Representative Capacity as Executrix Under the Will of Q. V. Russell, Everett Russell and Ruth Russell Howard,	Case No.: 670.
(b) Oliver O. Russell, vs. Elvie Russell, Individually and in Her Representative Capacity as Executrix Under the Will of Q. V. Russell, Everett Russell and Ruth Russell Howard.	Case No.: 671.

and that a decision, verdict and judgment in favor of the plaintiff in the instant case would make any decision in said two cases moot and any final judgment rendered in said two cases would constitute a cloud upon the title of the properties owned by the said Q. V. Russell at the time of his death and therefore the parties to said cases, all of whom are defendants to this case should be restrained and enjoined from further prosecuting the said cases until the determination and final judgment in this case.

—39—

That the said Judgment of Probate in Solemn Form is void as a matter of law for the following reasons:

(a) That the said purported Last Will and Testament, a copy of which is hereto attached as Exhibit "C" shows that it purports to have been executed by the said Q. V. Russell in the presence of three witnesses, Mrs. Delia Hol-

ley, W. M. Phillippe, Jr., and E. L. Smith, and the Order of Probate by the Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, being a part of Exhibit "B" hereto attached shows on its face that the Will was proved on the testimony of only two witnesses, to-wit, E. L. Smith and W. M. Phillippe, Jr., and the Law of Georgia requires that a Will probated in solemn form be proved by the testimony of all the witnesses thereto.

(b) Because under the Code of Georgia 113-104, the law provides that mutual wills may be made either separately or jointly and that the revocation of one shall be the destruction of the other and the said Order of the Ordinary, Burke County, Georgia, dated the 15th day of August, 1959, being a part of Exhibit "B" hereto attached, shows on its face that the said paper offered for probate was inquired into and considered only as it concerned the said Q. (Quiller) V. Russell and that no evidence was heard by the Court with reference to the question of whether or not the said purported joint mutual will of Mrs. Elvie H. Russell had been by the said Mrs. Elvie H. Russell revoked because if the said Mrs. Elvie H. Russell had revoked her will, such revocation would as a matter of law have revoked the paper as the will of the said Q. V. Russell.

Wherefore Plaintiff Prays as Follows:

(a) That process issue requiring the defendant to be and appear and Answer this Petition as required by law.

(b) That second original process issue directed to the Sheriff of Jefferson County, Georgia, for service of copies of this Petition upon the defendant, Elvie Russell, Individually and as Executrix of the Estate of Q. V. Russell, deceased, and upon Ruth Russell Howard, and that he make a return of his actions and doings to the Clerk of the Superior Court of Burke County, Georgia.

(c) That the defendants be temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them which the said Q. V. Russell owned at the time of his death.

(d) That Rule Ni Si issue directed to the defendant to be and appear before this Honorable Court to show cause, if any they have, why they should not be temporarily enjoined in accordance with the Prayers of this Petition.

(e) That the defendant be permanently enjoined from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them, or any of them, which were owned by the said Q. V. Russell at the time of his death.

(f) That an accounting be had between all parties to this suit so as to require and allow all parties to receive their legal share of the Estate of the said Q. V. Russell, deceased.

(g) That the Judgment of the Court of Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, purporting to probate the Last Will and Testament of Q. V. Russell in Solemn Form be declared void and an intestacy declared as to the death and Estate of the said Q. V. Russell.

(h) That the defendant be temporarily enjoined from further acts and proceedings of any nature in Case Numbers 670 and 671 now pending in Burke County Superior Court.

Count II.

-1-

That your plaintiff hereby adopts as a part of Count II of this petition paragraphs numbers 1 through 38, in-

clusive, of Count I hereof and shows to the Court the additional following facts:

-2-

That the said Order of Probate of the Last Will and Testament of said Q. V. Russell in Solemn Form by the Ordinary of Burke County, Georgia on the 15th day of August, 1959, hereto attached as part of Exhibit "B" and incorporated herein, is void because said probate was procured by the fraud of the defendant Mrs. Elvie Russell on the Court of Ordinary and upon your plaintiff all as hereinabove and hereafter alleged.

-3-

That in the proceedings of said probate of said purported Will of Q. V. Russell in Solemn Form, the defendant Mrs. Elvie Russell and her attorney remained silent and proceeded to attempt to probate the said Will without being placed under oath and without being sworn as a witness and without giving oral testimony and that said silence and said other acts were intentional on the part of the said defendant Mrs. Elvie Russell so as not to subject herself to possible perjury to conceal from the Ordinary the facts and her acts in so doing constituted a fraud upon that Court and upon your plaintiff.

-4-

That by her acts and doings, the said defendant Mrs. Elvie Russell falsely and fraudulently misrepresented to the Court of Ordinary of Burke County, Georgia a fact necessary for the said Court to obtain jurisdiction in that she and her attorney represented to said Court that the said Q. V. Russell died leaving a valid Will when she knew as a matter of fact said representation to be false and that as a matter of fact the said purported Last Will and Testament of the said Q. V. Russell was void and would not constitute a valid Last Will and Testament.

Wherefore plaintiff prays as follows:

(a) That process issue requiring the defendant to be and appear and answer this Petition as required by law.

(b) That second original process issue directed to the Sheriff of Jefferson County, Georgia for service of copies of this Petition upon the defendant, Elvie Russell, Individually and as Executrix of the Estate of Q. V. Russell, deceased, and upon Ruth Russell Howard, and that he make a return of his actions and doings to the Clerk of the Superior Court of Burke County, Georgia.

(c) That the defendants be temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them which the said Q. V. Russell owned at the time of his death.

(d) That Rule Ni Si issue directed to the defendants to be and appear before this Honorable Court to show cause, if any they have, why they should not be temporarily enjoined in accordance with the Prayers of this Petition.

(e) That the defendants be permanently enjoined from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them, or any of them, which were owned by the said Q. V. Russell at the time of his death.

(f) That an accounting be had between all parties to this suit so as to require and allow all parties to receive their legal share of the Estate of the said Q. V. Russell, deceased.

(g) That the Judgment of the Court of Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, purporting to probate the Last Will and Testament of Q. V. Russell in solemn form be declared void and an intestacy declared as to the death and Estate of the said Q. V. Russell.

(h) That the defendants be temporarily enjoined from further acts and proceedings of any nature in Case Numbers 670 and 671 now pending in Burke County Superior Court.

Count III.

-1-

That your plaintiff does hereby adopt as a part of and incorporates herein Count III, paragraphs 1 through 38, inclusive, of Count I and shows to the Court the additional following facts.

-2-

That the said Order of Probate of the Court of Ordinary dated the 15th day of August, 1959, and hereto attached as part of Exhibit "B", and herein incorporated is void because said Order was obtained by the fraud of the said defendant, Mrs. Elvie Russell, and her said attorney and the said Court of Ordinary of Burke County, Georgia, lacked jurisdiction of the subject matter for the following reasons:

(a) The affidavit of the defendant, Mrs. Elvie H. Russell, given on the 7th day of August, 1959, before Carlton G. Mathews, Jr., as Notary Public of Jefferson County, Georgia, does not constitute an affidavit as a matter of law or fact because the said Mrs. Elvie H. Russell was not sworn by the said Notary Public.

(b) That therefore the application and petition to probate hereto attached as Exhibit "B" was not verified as required by law and the Court did not have jurisdiction to inquire into the subject matter.

(c) That the said application to probate in solemn form, Exhibit "B" hereto attached, and in paragraph 2 thereof, misrepresented to the Court that the decedent, Quiller V.

Russell, made and published as Last Will and Testament in that the defendant and her attorney knew that the said Quiller V. Russell did not in fact make and publish the paper as his Last Will and Testament for the reasons hereinabove alleged.

(d) That the waiver of service to which your plaintiff's signature is attached, Exhibit "B", and incorporated herein, was obtained by fraud upon the plaintiff all as hereinabove alleged.

(e) That the affidavit of the witnesses, E. L. Smith and W. M. Phillippe, Jr., does not in law and fact constitute an affidavit because the said witnesses were not sworn by the Ordinary of Burke County, Georgia, at the time of executing said purported affidavit.

(f) That the affidavit of Mrs. Elvie Russell, Exhibit "B" hereto attached, and which purportedly was made before the Ordinary of Burke County, Georgia on the 15th day of August, 1959, is not in law and fact an affidavit because the said defendant, Mrs. Elvie Russell, was not administered an oath and was not sworn at the time she gave said purported affidavit.

(g) That at no time in the proceedings to probate the said Last Will and Testament of Q. V. Russell in solemn form, were any witnesses placed under oath.

(h) That there was no oral testimony taken in the said proceeding from either the defendant, Mrs. Elvie H. Russell, or from two of the witnesses to the Will, to-wit: E. L. Smith and W. M. Phillippe, Jr.

Wherefore, Plaintiff Prays as Follows:

(a) That process issue requiring the defendants to be and appear and answer this petition as required by law.

(b) That second original process issue directed to the Sheriff of Jefferson County, Georgia, for service of copies

of this petition upon the defendant, Elvie Russell, individually and as Executrix of the Estate of Q. V. Russell, deceased, and upon Ruth Russell Howard, and that he make a return of his actions and doings to the Clerk of the Superior Court of Burke County, Georgia.

(c) That the defendants be temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them which the said Q. V. Russell owned at the time of his death.

(d) That Rule Ni Si issue directed to the defendants to be and appear before this Honorable Court to show cause, if any they have, why they should not be temporarily enjoined in accordance with the prayers of this petition.

(e) That the defendants be permanently enjoined from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them, or any of them, which were owned by the said Q. V. Russell at the time of his death.

(f) That an accounting be had between all parties to this suit so as to require and allow all parties to receive their legal share of the Estate of the said Q. V. Russell, deceased.

(g) That the Judgment of the Court of Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, purporting to probate the Last Will and Testament of Q. V. Russell in solemn form be declared void and an intestacy declared as to the death and Estate of the said Q. V. Russell.

(h) That the defendants be temporarily enjoined from further acts and proceedings of any nature in Case Numbers 670 and 671 now pending in Burke County Superior Court.

Count IV.

-1-

That your plaintiff does hereby adopt as a part of and incorporate here in Count IV paragraphs 1 through 38, inclusive, of Count I and shows to the Court the following facts:

-2-

That the said purported mutual Last Will and Testament of Mrs. Q. V. Russell and Mrs. Elvie Russell hereto attached as Exhibit "C" shows that it was the intent of both of them that the said Will should be effective as to both or effective as to neither.

-3-

That the Order of Probate in Solemn Form by the Ordinary of Burke County, Georgia dated the 15th day of August, 1959, a part of Exhibit "B" hereto attached, shows on the face thereof that no testimony was taken as to whether or not the said alleged Mutual Will of Q. V. Russell and Mrs. Elvie Russell was properly executed by Mrs. Elvie Russell.

-4-

That the said Q. V. Russell executed his purported Mutual Will in consideration of the execution of said purported mutual will by Mrs. Elvie Russell.

-5-

That where one testator of a mutual will executes said mutual will in consideration of the execution by the other testator and where the will of the survivor of the two is not duly executed, that the consideration for the execution of the said will by the deceased fails and the will of the deceased cannot be legally probated.

That the failure of one testator to a mutual will to execute same with the formality required by law will as a matter of law make void the same as the will of the other testator.

Wherefore Plaintiff Prays as Follows:

(a) That process issue requiring the defendants to be and appear and answer this petition as required by law.

(b) That second original process issue directed to the Sheriff of Jefferson County, Georgia for service of copies of this petition upon the defendant Elvie Russell, individually and as Executrix of the Estate of Q. V. Russell, deceased, and upon Ruth Russell Howard, and that he make a return of his actions and doings to the Clerk of the Superior Court of Burke County, Georgia.

(c) That the defendants be temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them which the said Q. V. Russell owned at the time of his death.

(d) That Rule Ni Si issue directed to the defendants to be and appear before this Honorable Court to show cause, if any they have, why they should not be temporarily enjoined in accordance with the prayers of this petition.

(e) That the defendants be permanently enjoined from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them, or any of them, which were owned by the said Q. V. Russell at the time of his death.

(f) That an accounting be had between all parties to this suit so as to require and allow all parties to receive their legal share of the Estate of the said Q. V. Russell, deceased.

(g) That the Judgment of the Court of Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, purporting to probate the Last Will and Testament of Q. V. Russell in solemn form be declared void and an intestacy declared as to the death and Estate of the said Q. V. Russell.

(h) That the defendants be temporarily enjoined from further acts and proceedings of any nature in Case Numbers 670 and 671 now pending in Burke County Superior Court.

Count V.

-1-

That your plaintiff does hereby adopt as a part of and incorporates here in Count V paragraphs 1 through 38, inclusive, of Count I and shows to the Court the following facts:

-2-

That the said proceedings and judgment of probate in solemn form by the Ordinary of Burke County, Georgia dated the 15th day of August, 1959, part of Exhibit "B" hereto attached and incorporated herein, are void as depriving your plaintiff of her property without due process of law and as violating and denying to your plaintiff due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America for the following reasons:

(a) In that no oaths were administered to the affidavits of Mrs. Elvie Russell, of the 7th of August, 1959, and the 15th day of August, 1959, said purported affidavits being a part of Exhibit "B" and incorporated herein.

(b) That no oaths were administered to the affidavits of E. L. Smith and W. M. Phillippe, Jr. of the 15th day

of August, 1959, a part of Exhibit "B" hereto attached and incorporated herein.

(c) That there was no evidence given in the proceedings of probate in solemn form as to the attestation of said purported mutual Last Will and Testament by the said Mrs. Elvie Russell.

(d) That there was no oral testimony of any witnesses given in said proceedings to probate the purported Will in solemn form as to the attestation of the said Q. V. Russell.

(e) That there was no oral testimony or evidence given as to the location or whereabouts or absence of the witness Mrs. Delia Holley.

(f) That your plaintiff in said proceedings was deprived of her right and opportunity to cross-examine witnesses because there were no witnesses presented and there was no oral evidence taken on said proceeding to probate in solemn form as rquired by law.

(g) That the paper was not proved as the Will of Q. V. Russell.

Wherefore Plaintiff Prays as Follows:

(a) That process issue requiring the defendants to be and appear and answer this petition as required by law.

(b) That second original process issue directed to the Sheriff of Jefferson County, Georgia for service of copies of this petition upon the defendant Elvie Russell, individually and as Executrix of the Estate of Q. V. Russell, deceased, and upon Ruth Russell Howard, and that he make a return of his actions and doings to the Clerk of the Superior Court of Burke County, Georgia.

(c) That the defendants be temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, re-

ceived or held by them which the said Q. V. Russell owned at the time of his death.

(d) That Rule Ni Si issue directed to the defendants to be and appear before this Honorable Court to show cause, if any they have, why they should not be temporarily enjoined in accordance with the prayers of this petition.

(e) That the defendants be permanently enjoined from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them, or any of them, which were owned by the said Q. V. Rusell at the time of his death.

(f) That an accounting be had between all parties to this suit so as to require and allow all parties to receive their legal share of the Estate of the said Q. V. Russell, deceased.

(g) That the judgment of the Court of Ordinary of Burke County, Georgia, dated the 15th day of August, 1959, purporting to probate the Last Will and Testament of Q. V. Russell in solemn form be declared void and an intestacy declared as to the death and Estate of the said Q. V. Russell.

(h) That the defendants be temporaily enjoined from further acts and proceedings of any nature in Case Numbers 670 and 671 now pending in Burke County Superior Court.

Thurmond, Hester, Jolles & McElmurray,
By: /s/ Cornelius B. Thurmond, Jr.,
and
/s/ Thomas M. Odom,
Attorneys for Plaintiff.

Exhibit "A".

APPLICATION TO PROBATE WILL.

Georgia,
Burke County.

To the Court of Ordinary of Said State and County:

The application of Mrs. Elvie Russell whose post office address is Keysville, Georgia shows to the court that Q. V. Russell whose domicile was Burke County, Georgia and whose legal address was Keyesville, Georgia departed this life on June 26th, 1959, after having made and published his last will and testament, in which your petitioner was named executrix.

Petitioner lists below the names of the decedent's spouse, all devisees and legatees and all the heirs at law, together with the age, address, residence and relationship, to decedent, set opposite the name of each.

Namely:

Spouse:

Name	Age	Address	Relationship
Mrs. Elvie Russell	65	Keyesville, Georgia	Wife

Heirs at Law:

Name	Age	Address	Relationship
Oliver Russell	48	Keysville, Georgia	Son
Geneva Russell Marshall	46	Keysville, Georgia	Daughter
Everett Russell	43	Sardis Georgia	Son
Ruth Russell Howard	40	Keysville, Georgia	Daughter

Devisees and Legatees:

Name	Age	Address	Relationship
Mrs. Elvie Russell	65	Keyesville, Georgia	Wife

Wherefore, applicant produces said will in court and prays leave to prove said will in common form, that it be admitted to record on proper proof; that Letters Testamentary issue and that due and legal service or notice be given as the law requires and that this court order

such other relief as may be meet and proper under the circumstances.

This 6th day of July, 1959.

/s/ Mrs. Elvie Russell,
Applicant.

Personally appeared before me, the undersigned, who on oath states that to the best of the knowledge and belief of undersigned the facts set forth in the foregoing application are true.

/s/ Mrs. Elvie Russell.

Sworn to and subscribed before me, this 6th day of July, 1959.

/s/ John J. Jones, Ordinary.

EXECUTOR'S OATH.

State of Georgia,
Burke County.

I do solemnly swear that the within attached writing contains the true last Will of the within named Q. V. Russell deceased, so far as I know, or believe, and that I will well and truly execute the same in accordance with the law of this State. So help me God.

/s/ Mrs. Elvie Russell.

Sworn to and subscribed before me, this 6th day of July, 1959.

/s/ John J. Jones, Ordinary.

Affidavit to Probate Will in Common Form.

State of Georgia,
Burke County.

Before Me Came E. L. Smith named as a witness to the within writing, purporting to be Q. V. Russell's and Mrs. Elvie Russell's Mutual last Will, and being duly sworn,

saith that he with Mrs. Delia Holley and W. M. Phillippe, Jr. at the request of Q. V. Russell and Mrs. Elvie Russell and in their presence and in the presence of each other, did attest as witnesses the within attached writing as Q. V. Russell and Mrs. Elvie Russell's Mutual Last Will; that the same was signed and published by them in their presence as their last Will; that they were at the time of said attestation and signing by them of sound and disposing mind and memory; that they executed the within paper voluntarily.

/s/ E. L. Smith,
Witness.

Sworn to and subscribed before me, this 6th day of July, 1959.

/s/ John J. Jones, Ordinary.

ORDER.

Burke Court of Ordinary July Term, 1959

The Above Petition of Mrs. Elvie Russell nominated Executrix of the last alleged Will of Q. V. Russell duly filed, having been supported by proper proof of E. L. Smith a witness of said Will, that said Q. V. Russell died a resident of said County; that he and the other witnesses, Mrs. Delia Holley and W. M. Phillippe, Jr. saw him sign and heard him publish the alleged Will as his own last Will, that he attested the same as a witness at his request, and in his presence with Mrs. Delia Holley and W. M. Phillippe, Jr. so attesting also at his request; that said Q. V. Russell was, at the time of said signing and attestation, of sound and disposing mind and memory, and did, in the execution of said Will, act freely and voluntarily; it is ordered that the same be duly recorded, having been duly proved in common form, and that letters testamentary issue to her upon her taking oath of office.

/s/ John J. Jones, Ordinary.

LETTERS TESTAMENTARY.

State of Georgia, Burke County,

By the Honorable John J. Jones, Ordinary of Said County.

Know All Whom It May Concern:

That on the 6th day of July, 1959, the last Will and Testament of Q. V. Russell deceased, at the time of his death a resident of said County, was legally proven in Common form, and on the 6th day of July, 1959, at a regular Term of the Court of Ordinary, said will was admitted to record by order, and Mrs. Elvie Russell named Executrix in said Will, allowed to qualify, and upon so doing, Letters Testamentary ordered to be issued to her as such Executrix.

Now, Therefore, the said Mrs. Elvie Russell having taken the oath of office, and complied with all the necessary prerequisites of the law, is legally authorized to discharge all the duties of an Executrix on the Will of said deceased, to administer the property of said deceased, which is devised according to the Will and the law; and she is hereby required to render a true and perfect inventory without appraisement of all and singular the goods and chattels, rights and credits of said deceased, and make a return of them to the Ordinary of Burke County; and further, to report annually to the same office of the situation of said estate, her actings and doings, until her Executorship is fully discharged.

Given under my hand and official seal, the 6th day of July, 1959.

/s/ John J. Jones,
Ordinary.

(Official Seal)

Exhibit "B".

In the Court of Ordinary.

State of Georgia
County of Burke

In Re: Estate of Quiller V. Russell.

Probate in Solemn Form.

To the Court of Ordinary of Said State and County and to the Honorable John J. Jones, Judge Thereof:

The application of Mrs. Elvie H. Russell, hereinafter called "Petitioner", whose post office address is Keysville, Burke County, Georgia, respectfully shows to the court the following facts, to-wit:

1. That Quiller V. Russell, whose place of domicile and legal residence was Keysville, Burke County, Georgia, departed this life on the 26th day of June, 1959, owning certain real and personal property.

2. The decedent, during his lifetime, made and published a last will and testament, which was duly offered and probated in common form on the 6th day of July, 1959, and is now on file and record in the office of the Ordinary of Burke County, Georgia, and your petitioner is named Executrix thereof.

3. Listed below are all of decedents heirs at law, devisees and legatees, and his surviving spouse, together with the age, address, residence and relationship to the decedent set opposite the name of each.

Name	Age	Address	Relationship
Mrs. Elvie H. Russell	65	Keysville, Georgia	Wife
Oliver O. Russell	48	Keysville, Georgia	Son
Mrs. Geneva Marshall	46	Keysville, Georgia	Daughter
Mrs. Ruth R. Howard	40	Keysville, Georgia	Daughter
George E. Russell	43	Sardis, Georgia	Son

4. There is no additional data, particulars or omissions.

5. All of the heirs at law hereinbefore set forth are of legal age and sui juris, and have acknowledged service of these proceedings and have waived service, citation and process and have agreed for said will to be probated in solemn form instanter or at any time. A copy of said waiver is attached hereto and made a part hereof.

Wherefore Petitioner Prays:

Leave to prove said last will and testament in solemn form; that it be admitted to record on proper proof; that letters testamentary issue and that this court order such other relief as may be meet and proper under the circumstances.

/s/ Mrs. Elvie Russell,
/s/ Carlton G. Matthews, Jr.,
Petitioner's Attorney,
Law Offices,
Carlton G. Matthews, Jr.,
Wrens, Georgia.

State of Georgia,
County of Burke.

Personally appeared before the undersigned attesting officer duly authorized to administer oaths, came Mrs. Elvie H. Russell, who after being duly sworn, deposes and says that the facts set forth in the foregoing application to probate in solemn form are true and correct.

This the 7 day of August, 1959.

/s/ Mrs. Elvie H. Russell.

Sworn to and subscribed before me this the 7 day of August, 1959.

/s/ Carlton G. Matthews, Jr.,
Notary Public, Jefferson County,
Georgia.

My commission expires 9-28-1961.

(Seal)

In the Court of Ordinary for Said County.

State of Georgia,
County of Burke.

In Re: Estate of Quiller V. Russell.

Probate in Solemn Form.

To the Court of Ordinary of said County.

WAIVER OF SERVICE.

We, the undersigned, all being sui juris and the wife and children of Quiller V. Russell, late of said State and County, do hereby acknowledge and waive all service, citation and process, and copies of same, in the matter of the probate of the last will and testament of the deceased in solemn form and do hereby waive all further and other service, citation and process in said matter and agree that said proceeding to probate in solemn form may be instanter or at any time.

This the 7 day of August, 1959.

/s/ Mrs. Elvie H. Russell,
/s/ Oliver O. Russell,
/s/ Geneva R. Marshall,
/s/ George Everett Russell,
/s/ Mrs. Ruth R. Howard.

Witness:

/s/ Carlton G. Matthews, Jr.,
N. P., Jefferson Co., Ga.

My Commission expires 9-28-1961.

(Seal)

State of Georgia,
County of Burke.

In the Court of Ordinary,
August Term, 1959.

Mrs. Elvie Russell,
Propounder,

vs.

Quiller V. Russell,
Deceased.

In Re: Petition to Probate in Solemn Form the Last Will and Testament of Quiller V. Russell, Dec.

The above stated petition coming on to be heard, and it appearing that the parties at interest, Mrs. Elvie H. Russell, Oliver Q. Russell, Mrs. Geneva Marshall, Mrs. Ruth R. Howard and George Everett Russell have had legal notice of said application and the time of its hearing, all of the above parties have waived such matters, and it appearing to the satisfaction of this Court by the testimony of the witnesses to this Will, E. L. Smith and W. M. Phillippe, Jr., that this paper is the last Will and Testament of Quiller V. Russell and that he was competent to make a Will at the time he signed and executed the same.

It further appearing that no legal and sufficient cause has been shown why said paper should not be proved and admitted to record as the last Will and Testament of the deceased as prayed.

It Is Ordered and Adjudged by This Court:

That the same be admitted to record as the Last Will and Testament of the said deceased.

Ordered further that Letters Testamentary issue to Mrs. Elvie H. Russell, the Executrix named in said Will, upon her taking oath as required by law.

This the 15th day of August, 1959.

/s/ John J. Jones,
Ordinary, Burke County, Georgia.

State of Georgia,
County of Burke.

OATH OF EXECUTRIX.

I, Mrs. Elvie H. Russell, do solemnly swear that, so far as I know or believe, this writing contains the true last Will and testament of the within named Quiller V. Russell, deceased, and that I will well and truly execute the same in accordance with the laws of this State. So Help Me God.

/s/ Mrs. Elvie Russell.

Sworn to and subscribed before me, this the 15 day of August, 1959.

/s/ John J. Jones,
Ordinary, Burke County, Georgia.

State of Georgia,
County of Burke.

In the Court of Ordinary of Said County.

In Re: Probate in Solemn Form of the Last Will and Testament of Quiller V. Russell.

AFFIDAVIT OF WITNESSES.

We, the undersigned, E. L. Smith and W. M. Phillippe, Jr., do swear that we saw the within named Quiller V. Russell sign and publish the within attached paper, or that he acknowledged that the signature appearing thereon was his signature, and that he signed the same, as his Last

Will and Testament, and that we subscribed the same as witnesses thereto at the special instance and request of the said Quiller V. Russell and in his presence and that the said Quiller V. Russell signed the same freely and voluntarily, and was, at the time of such signing, of sound and disposing mind and memory.

/s/ E. L. Smith,
/s/ W. M. Phillippe, Jr.

Sworn to and subscribed before me this the 15th day of August, 1959.

/s/ John J. Jones,
Ordinary, Burke County, Georgia.

State of Georgia,
County of Burke.

In the Court of Ordinary of Said County.

In Re: Probate in Solemn Form of the Last Will and Testament of Quiller V. Russell.

I, the undersigned, Mrs. Elvie Russell, wife of the deceased, Quiller V. Russell, do swear that the within last will and testament of myself and Quiller V. Russell, is a joint survivorship will and that we signed the same in the presence of each other and that I saw the within named Mrs. Delia Holley sign her name as a witness thereto she doing so in my presence as well as did the other witnesses thereto, E. L. Smith and W. M. Phillippe, Jr. I do further swear that to the best of my knowledge Mrs. Delia Holley is a non-resident of the State of Georgia, her residence now being somewhere in the State of Tennessee.

/s/ Mrs. Elvie Russell.

Sworn to and subscribed before me this the 15 day of August, 1959.

/s/ John J. Jones,
Ordinary, Burke County, Georgia.

LETTERS TESTAMENTARY.

State of Georgia,
Burke County.

By the Honorable John J. Jones, Ordinary of Said County.

Know All Whom It May Concern:

That on the 15th day of August, 1959, the last will and testament of Q. V. Russell deceased, at the time of his death a resident of said County, was legally proven in Solemn form, and on the 15th day of August, 1959, at a regular Term of the Court of Ordinary, said Will was admitted to record by order, and Mrs. Elvie Russell named Executrix in said Will, allowed to qualify, and upon so doing, Letters Testamentary ordered to be issued to her as such Executrix.

Now, Therefore, The said Mrs. Elvie Russell having taken the oath of office, and complied with all the necessary prerequisites of the law, is legally authorized to discharge all the duties of an Executrix on the Will of said deceased, to administer the property of said deceased, which is devised according to the Will and the law; and she is hereby required to render a true and perfect inventory without appraisement of all and singular the goods and chattels, rights and credits, of said deceased, and make a return of them to the Ordinary of Burke County; and further, to report annually to the same officer of the situation of said estate, her actings and doings, until her Executorship is fully discharged.

Given under my hand and official seal, the 15th day of August, 1959.

/s/ John J. Jones,
Ordinary.

(Official Seal)

Exhibit "C".

Mutual Will of Mr. Q. V. Russell and Mrs. Elvie Russell.

Georgia, Burke County.

We, Q. V. Russell, husband, and Mrs. Elvie Russell, wife, residents of said State and County, being of sound and disposing mind and memory, and fully cognizant of the shortness, as well as the uncertainty of life, and desiring while in life and good health to make a disposition of the worldly goods which we have accumulated together during our life, which to our minds seem meet and proper, do make, declare and publish this a Mutual Last Will and Testament, hereby revoking all others, by us heretofore made and published.

Item I. It is our mutual desire and wish that the survivor of either of us, knowing that the survivor will provide and take care of the estates we have created, and will provide for our children born and to be born, those now in life being Oliver Russell, Geneva Russell Freeman, Everett Russell and Ruth Russell Howard, shall take charge of all kinds of property that the deceased may own at his or her death, and handle it properly to the best advantage. Therefore it is our mutual will and desire, and we hereby give, bequeath and devise to the survivor all property of all kinds and descriptions, and wherever located and whatever nature to have and to hold the same in fee simple.

Item II: It is our mutual will and desire that the just debts of the deceased be paid as soon as practical by the survivor who is is hereafter made the executor hereof.

Item III. It is our desire and mutual will, and we know that it will be carried out, that the survivor will bury the deceased one in a decent and Christianlike manner.

Item IV. We hereby constitute and appoint the survivor of either of us to be the sole executor of this our

will and testament, and we expressly confer upon the survivor, to administer the estate of the deceased one, excusing him from giving bond; but requiring he or she to make and file an inventory without appraisement with the Ordinary of the county in which shall live at the time of death of one of us, and without any order of court or authority. And we expressly confer upon the survivor of us the power and authority to sell any and all of the estate, at public or private sale, without advertising, as she or he may deem best, and without any order from any court whatever, to make good and sufficient titles to said purchaser. We ask that the survivor do make a final return of his actings and doings, and grant authority to the Ordinary to discharge the survivor from his or her trust without advertising the same at any time.

After due and long consideration we have herein expressed our mutual desire and have made this our mutual last will and testament in the presence of these witnesses.

This 20 day of August, 1946.

/s/ Q. V. Russell,
/s/ Mrs. Elvie Russell.

Signed, sealed, declared and published by Q. V. Russell and Mrs. Elvie Russell as their last mutual will and testament, in the presence of us, the undersigned, who subscribed our names hereto in the presence of said testator and testatrix, after each of them had signed their names thereto and at their special instance and request, and in the presence of each other.

This 20 day of August, 1946.

/s/ Mrs. Delia Holley,
/s/ W. M. Phillippe, Jr.,
/s/ E. L. Smith.

Exhibit D.

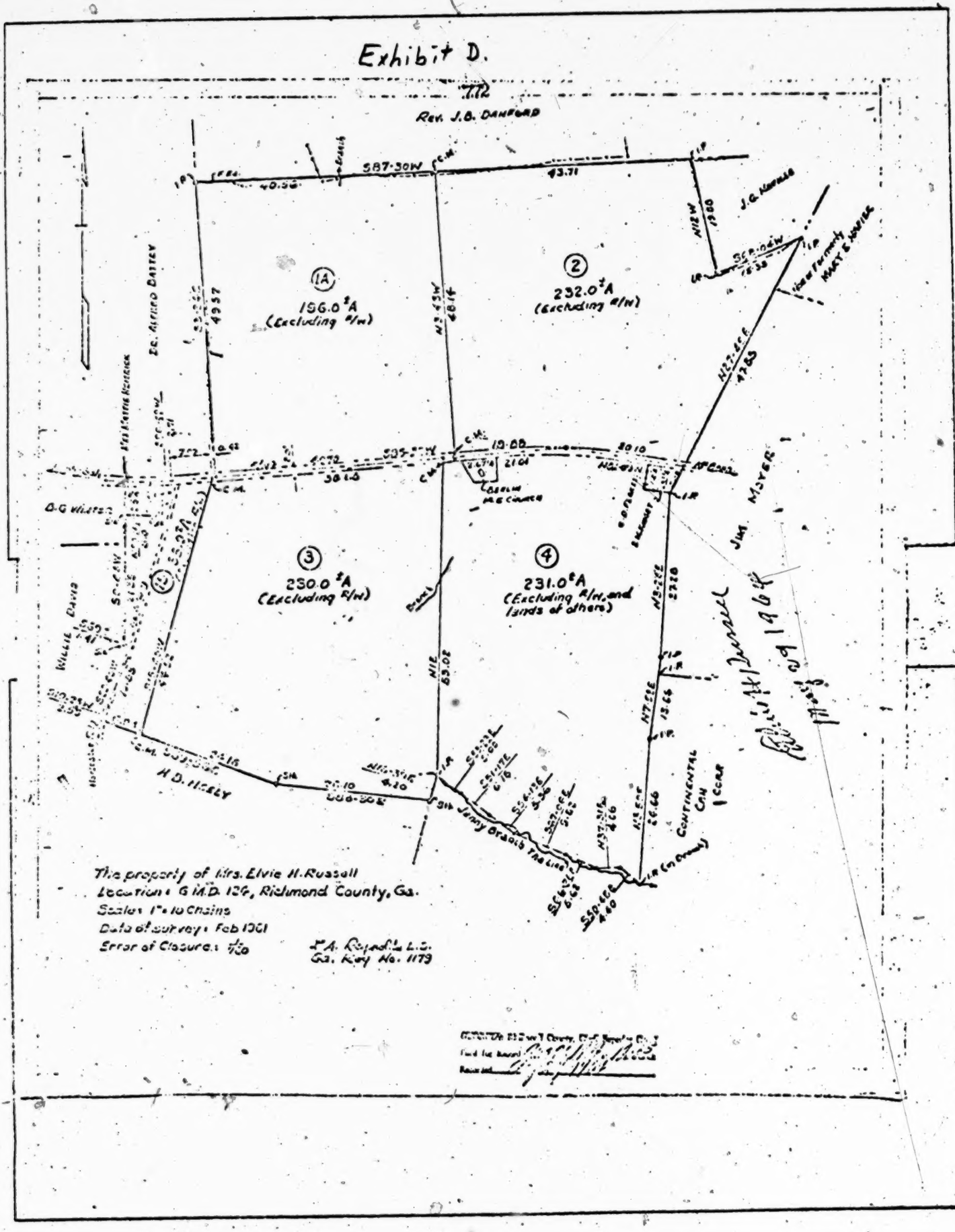

Rev. J.B. DANFORD
S87-30W
43.71
J.C. HOWARD
Ec. Alfred Battey
1A
196.0 ²A
(Excluding R/W)
2
232.0 ²A
(Excluding R/W)
3
230.0 ²A
(Excluding R/W)
4
231.0 ²A
(Excluding R/W, and
Lands of others)
O.G. Wilson
Willie Davis
H.D. Hasty
Jim Myers
Elvie H. Russell
Deed Book 194 Page 64
Continental Can
1 Corr
9th Jenny Branch Trib Line
This property of Mrs. Elvie H. Russell
Location: G.M.D. 126, Richmond County, Ga.
Scale: 1" = 10 Chains
Date of survey: Feb 1961
Error of Closure: 1/10
T.A. Reynolds L.S.
Ga. Reg. No. 1179

Exhibit "E".

All those two (2) tracts or parcels of land, situate, lying and being in the State of Georgia, County of Richmond, 12th D. G. M., which are known and designated as Tracts 1A and 2 containing 196 acres, more or less, and 232 acres, more or less, respectively, which two tracts of land are more fully shown and delineated on a certain plat of survey prepared by L. A. Reynolds, L. S., attached to a deed from the party of the first part to Ruth Russell Howard of even date herewith, to which reference is made for a more particular description of said two tracts of land which are bounded generally North by property now or formerly of Danford; East by property now or formerly of Neville, Napier and Moyer; South by the Hephzibah-McBean Road; and West by property now or formerly of Dr. Alfred Battey.

Exhibit "F".

All those three (3) tracts or parcels of land situate, lying and being in the state of Georgia, County of Richmond, 124th D. G. M., which are known and designated as tracts 1B, 3 and 4, containing 35 acres, more or less, 230 acres, more or less, and 231 acres, more or less, respectively, which three said tracts of land are more fully shown and delineated on a certain plat of survey prepared by L. A. Reynolds, L. S., which is attached hereto, to which reference is made for a more particular description of three said tracts of land, which are bounded generally North by the Hephzibah-McBean Road; East by property now or formerly of Jim Moyer and Continental Can Corporation; South by Jenny Branch and property now or formerly of H. B. Neely; and West by property now or formerly of Willie Davis and B. G. Winter.

Exhibit "G".

-1-

Tract of land in Burke County, Georgia, consisting of 3.38 acres, called the old Augusta Railroad Right of Way and recorded in Deed Book 41, pages 23-24 and Deed Book 38, page 100.

-2-

Tract of land in Burke County, Georgia, containing 2.8 acres, being located around the Georgia and Florida Railroad Track, the description of which is recorded in said Clerk's Office in Deed Book 34, page 376.

-3-

Tract of land in Burke County, Georgia, consisting of 1.646 acres and known as the Will Martin or Ray Evans house, the description of which is shown in Plat Book 3, page 116 and Deed Book 60, page 246.

-4-

Tract of land consisting of 6 acres in Burke County, Georgia and known as the warehouse property, the description of which is recorded in Book 371, page 27.

-5-

Tract of land consisting of 136 acres in Burke County, Georgia, known as the Crawford Place, a description of which is contained in Book 35, at page 49.

-6-

Tract of land 24 feet wide by 60 feet deep and on which there is a store building, in Burke County, Georgia, the description of which is contained in Book 41, page 571.

-7-

Tract of land consisting of one-half (½) acre in Burke County, Georgia and being known as the store building

lot, the description of which is contained in Book 11, page 527.

-8-

Tract of land consisting of 48 acres in Burke County, Georgia, bounded on the West by lands of J. E. Rhoades and J. H. Howell, South by a 20 foot alley and East by Shumaker Avenue and being more fully described on plat made by Herman May, C. S. on November 9, 1949, the description of which appears in Book 55, page 187.

-9-

Tract of land known as the Railroad Right of Way in Burke County, Georgia, the description of which appears in Book 45, page 473-74.

-10-

Tract of land consisting of 220 acres in Burke County, Georgia and known as the Chain Gang Place, originally consisting of 300 acres, 80 acres having been sold to Dr. Timmerman, the description of which is found in Book 21, page 612.

-11-

Tract of land consisting of 197½ acres in Richmond County, Georgia and known as the H. W. Sewell Place, the description of which is recorded in Book 11-L, page 475-476.

-12-

Tract of land consisting of 345.29 acres, known as the J. Judd Saxon Place, the description of which is recorded in Realty Book 10-J, pages 196-197.

-13-

Tract of land consisting of 311.5 acres in Richmond County, Georgia known as the William T. Skinner Homeplace, the description of which is found in Book 13-X, page 262.

– 14 –

Tract of land consisting of 138 acres in Jefferson County, Georgia known as the Jerry J. Jackson or Gum place, the description of which is found in Book 2-S, page 469.

– 15 –

Tract of land consisting of 132 acres in Burke County, Georgia known as the Dies Hill Place or the Quisenby Place, a description of which is found in Book 1, page 11.

– 16 –

Tract of land consisting of 146 acres in Burke County, Georgia, the description of which is found in Book 56, page 51.

– 17 –

Three (3) houses and lots located in Burke County, Georgia, the description of which is located in Book 29, page 517.

State of Georgia,
Burke County.

Personally appeared before the undersigned attesting officer, came Geneva R. Marshall, the plaintiff in the within and foregoing case and after being duly sworn deposes and says that the facts contained in the within and foregoing Petition and all of its Counts are true and correct to the best of her knowledge and belief.

Geneva R. Marshall.

Sworn to and subscribed before me this 5th day of March, 1966.

Thomas M. Odom,
Notary Public,
Jenkins County, Georgia.

In the Superior Court for Burke County, Georgia.

State of Georgia,
Burke County.

Geneva R. Marshall,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

ORDER AND RULE NI SI.

The within and foregoing petition having been presented, read and considered, It Is Hereby Ordered, Decreed and Adjudged as Follows:

1.

That the defendants are temporarily restrained from the disposal of or encumbering of any properties and monies in their care, custody, possession and control, received or held by them which the said Q. V. Russell owned at the time of his death, and until further Order of the Court.

2.

That the defendants are hereby ordered to show cause before me, if any they have, on the 8th day of March, 1966, at 10:00 o'clock A. M., at the Courthouse, Burke County, Georgia, why they should not be restrained or temporarily enjoined from taking any further acts or proceedings in Case Numbers 670 and 671, more fully described and captioned in paragraph 38 of each Count of the petition, the said cases now being pending in Burke County Superior Court.

3.

Let a copy of the petition and this Order be served upon each of the defendants as prayed instanter.

This the 5th day of March, 1966.

F. Frederick Kennedy,
Judge, Superior Court, Burke County,
Georgia, Augusta Circuit.

Order presented by:

Cornelius B. Thurmond, Jr.

Notice is hereby given to Defendant not to compromise or settle this action against him, except through the undersigned, as no other settlement will release him from liability for Attorney's fees of plaintiff.

To the Sheriff of Said County or His Lawful Deputy, Greeting.

PROCESS.

State of Georgia,
Burke County.

Geneva R. Marshall,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

The Defendants, Elvie Russell, individually and in her representative capacity as Executrix of the Estate of Q. V. Russell, deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell, hereby required, in person

or by attorney, to be and appear at the Superior Court and for the County aforesaid, within thirty days after service of this petition upon you then and there answer the Plaintiff's Complaint. As in default of such appearance, said Court will proceed thereon, as to justice may appertain.

Witness, the Honorables F. Frederick Kennedy, John F. Hardin and C. Wesley Killebrew, Judges of said Court, this 5 day of March, 1966.

Raymond N. DeLaipe,
Clerk.

Raymond N. DeLaipe,
Clerk, Superior Court,
Burke County, Ga.

Sheriff's Service From Original Petition.

State of Georgia,
Richmond County.

I have this day served the Defendants Oliver Russell and Everett Russell with a copy of the within Petition and Process, at **in person** this 5 day of March, 1966.

W. J. Blackston,
Deputy Sheriff,
Burke County.

Sheriff's Service From Second Original.

State of Georgia,
Jefferson County.

I have this day served the Defendants Ruth Russell Howard and Mrs. Elvie Russell with a copy of the within Petition and Process, at home in person this 5th day of March, 1966.

Zollie Compton,
Sheriff, Jefferson Co., Georgia.

JDC:mcb

3/8/66

State of Georgia,
Burke County.

In the Superior Court for Burke County, Georgia.

Geneva R. Marshall,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

Case No. 778.

GENERAL DEMURRERS.

Now comes Elvie Russell, in her representative capacity as Executrix of the Estate of Q. V. Russell, a Defendant in the above entitled case files these her General Demurrers to Plaintiff's Petition for grounds thereof says:

1. That this Defendant generally demurs to Plaintiff's Petition as a whole and to each and every Count thereof on the grounds that neither said Petition as a whole or any one of the Counts set forth in said Petition sets forth a cause of action against this Defendant.

Wherefore, this Defendant prays that Plaintiff's Petition and each and every Count thereof be dismissed.

Cumming, Nixon, Eve, Waller & Capers,
Attorneys for Elvie Russell in Her Representative Capacity as aforesaid,
By John D. Capers,
Leading Counsel.

I hereby certify that I have served a copy of the within and foregoing Pleading in person upon opposing counsel prior to the filing thereof.

This 8 day of March, 1966.

John D. Capers.

Filed in office this 8th day of March, 1966.

Raymond N. De Laigle,
Clerk, Superior Court,
Burke County, Ga.

State of Georgia,
Burke County.

Burke Superior Court.

Geneva R. Marshall,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

No. 778.

DEMURER OF ELVIE RUSSELL.

Comes now Elvie Russell, individually, one of the defendants in the above stated case, and files this her general demurrer to plaintiff's petition on the following grounds:

1. Because said petition in its entirety, consisting of five (5) counts, and said counts separately one (I) through five (V), respectively, do not set forth any cause of ac-

tion against this defendant nor entitle plaintiff to any relief sought.

2. Because said petition in its entirety and said counts separately do not set forth any cause of action against this defendant because this Court is without jurisdiction of said petition in its entirety and said counts separately because the same constitute a collateral attack upon a judgment of the Court of Ordinary of Burke County, Georgia.

3. Because said petition in its entirety and said counts separately do not set forth any cause of action against this defendant because the judgment of the Court of Ordinary ordering to probate in solemn form the Will of Q. V. Russell sought to be set aside was rendered on August 15, 1959, more than three (3) years prior to the filing of this suit on March 5, 1966, and is, therefore, barred by the Statute of Limitations.

4. Because said petition in its entirety and said counts separately do not set forth any cause of action against this defendant because it appears therefrom that the plaintiff failed to exercise the diligence required to discover the facts upon which she now bases her claim for relief prior to said judgment of the Court of Ordinary of August 15, 1959, or within three (3) years thereafter.

5. Because said petition in its entirety and said counts separately do not set forth any cause of action against this defendant because the judgment of the Court of Ordinary ordering to probate in solemn form the Will of Q. V. Russell on August 15, 1959, could not have been entered up without the evidence of E. L. Smith, W. M. Phillippe, Jr., and Mrs. Elvie Russell, and it does not appear that these persons, charged with perjury by the allegations of the petition, have been thereof duly convicted.

6. This defendant specially demurs to the allegations of paragraph thirty-eight (38) of the plaintiff's petition and

to said paragraph in the several counts thereof because the same is a conclusion of the pleader and copies of said cases are not attached to said petition or the several counts thereof, nor are the proceedings set forth therein and copies of said entire proceedings are not attached so as to enable this Court to examine the same and determine the effect of any final judgment in either of said cases or in this case and to enable this defendant to properly defend herself against all litigation arising from the probate in solemn form of the Will of Q. V. Russell.

Wherefore, this defendant prays that this her demurrer be sustained and that plaintiff's petition be dismissed.

Fulcher, Fulcher, Hagler, Harper & Reed,
By E. D. Fulcher,
Attorneys for Defendant,
Elvie Russell.

I certify this pleading has been served upon opposing counsel prior to filing.

This 28th day of March, 1966.

E. D. Fulcher.

Filed in office this 29th day of March, 1966.

Raymond N. De Laigle,
Clerk, Superior Court,
Burke County, Ga.

In Burke Superior Court.

Equitable Petition.

Geneva R. Marshall

v.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

No. 778.

DEMURRERS OF DEFENDANTS RUTH RUSSELL HOWARD AND EVERETT HOWARD.

Now come Ruth Russell Howard and Everett Russell, defendants in the above stated case, and demur to the plaintiff's petition on the following grounds:

1. Said petition does not as a whole, nor do any of its several counts, paragraphs or parts, show a cause of action against defendants.

2. Said petition shows on its face that the judgment of the Court of Ordinary of Burke County probating the will of Q. V. Russell in solemn form, which judgment the said petition seeks to set aside, was rendered more than three years prior to the filing of the instant petition, and this petition is therefore barred under the provisions of Code, Section 3-702.

3. The petition seeks to set aside a judgment obtained by perjured testimony without alleging that the witnesses giving the perjured testimony have been prosecuted and convicted.

4. The petition collaterally attacks the judgment of the Court of Ordinary of Burke County and the recitals made in the order of that court by the Honorable John J. Jones, Ordinary presiding, without making said Ordi-

nary a party to this suit, and the Ordinary is a necessary party to any suit seeking to impugn his conduct of the official affairs of his office.

Wherefore, these defendants pray that this their demurrer be sustained and that plaintiff's petition be dismissed.

R. U. Hardin,
Attorney for Defendants, Ruth Russell Howard and Everett Russell.

I hereby certify that I have served counsel for all parties with a copy of the foregoing demurrer prior to filing.

This 1st day of April, 1966.

R. U. Hardin.

Filed in Office This 2nd Day of April, 1966.

Raymond N. DeLaigle,
Clerk, Superior Court,
Burke County, Georgia.

State of Georgia,
Burke County.

Geneva R. Marshall

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

No. 778.
Burke Superior Court.

ORDER SUSTAINING DEMURRER.

The demurrer of Elvie Russell, Individually, came on regularly to be heard on May 19, 1966, and after argument of counsel the same was taken under advisement.

It Is Now Considered, Ordered and Adjudged that grounds one (1), two (2), three (3), four (4), and five (5) of said demurrer of Elvie Russell, Individually, be, and the same are hereby sustained and the petition of the plaintiff is hereby dismissed.

This 20th day of May, 1966.

(Illegible),
J. S. C. A. C.

Filed in Office This 21st Day of May, 1966.

Raymond N. DeLaigle,
Clerk, Superior Court,
Burke County, Georgia.

State of Georgia,
Burke County.

In the Superior Court of Burke County, Georgia.

Geneva R. Marshall

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell.

Case No. 778.

ORDER.

The general demurrers of Ruth Russell Howard, Everett Russell and Elvie H. Russell, as Executrix of the Estate of Q. V. Russell to the Plaintiff's Petition as a whole and each and every count thereof having come on to be heard by me on May 19, 1966, and after hearing argument of counsel for the Plaintiff and Defendants;

It Is Ordered that said general demurrers be and they are hereby sustained on each and every ground thereof and the Petition of Plaintiff is hereby dismissed.

This 20th day of May, 1966.

(Illegible)
J. S. C. A. C.,
First Division.

Filed in Office This 21st Day of May, 1966.

Raymond N. DeLaigle,
Clerk, Superior Court,
Burke County, Georgia.

State of Georgia,
County of Burke.

I, Raymond N. DeLaigle, Clerk Superior Court, Burke County, Georgia, do hereby certify that the foregoing pages contain the original Notice of Appeal together with a true and complete copy of those portions of record required by the Notice of Appeal to be transmitted to the Supreme Court of Georgia.

Given under official hand and seal of office this 24th day of May, 1966.

(Seal)

Raymond N. DeLaigle,
Clerk Superior Court,
Burke County, Georgia.

CBT, Jr. grb
5/30/1966

Case No.: 23,576.

In the Supreme Court of the
State of Georgia.

Geneva R. Marshall,
Appellant,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell,
Appellees.

Appeal From the Superior Court,
Burke County, Georgia,
Augusta Circuit.

Enumeration of Errors.

Post Office Address:
Thurmond, Hester, Jolles and
McElmurray,
Southern Finance Building,
Augusta, Georgia,
Thomas M. Odom,
Millen, Georgia,
Attorneys for Appellant.

Now Comes Geneva R. Marshall, Appellant in the above stated case and files this her Enumeration of Errors as follows:

-1-

Because the Trial Court erred in sustaining on each and every ground thereof the general demurrers of Elvie H. Russell, Individually and in her representative capacity as Executrix of the Estate of Q. V. Russell, deceased, Ruth Russell Howard and Everett Russell to the plaintiff's petition as a whole and to each and every count thereof and dismissing plaintiff's petition on the grounds that it did not state a cause of action against the defendants as a whole or in any of its counts.

-2-

Because the Trial Court erred in sustaining the demurrers of Elvie Russell, Individually, Ruth Russell Howard and Everett Russell and dismissing plaintiff's petition on the ground that the petition sought to set aside a judgment of the Court of Ordinary of Burke County, Georgia, rendered more than three (3) years prior to filing of the petition and that the petition was therefore barred under the provisions of Georgia Code 3-702 which provides that proceedings to set aside judgments shall be made within three (3) years from the rendition thereof.

-3-

Because the Trial Court erred in sustaining the demurrers of Elvie Russell, Individually, Ruth Russell Howard and Everett Russell, and dismissing the petition of plaintiff on the ground that the petition did not set forth a cause of action because the Trial Court was without jurisdiction because the petition constitutes a col-

lateral attack upon a judgment of the Court of Ordinary of Burke County, Georgia.

-4-

Because the Trial Court erred in sustaining the demurrer of Elvie Russell, Individually, and dismissing the petition of plaintiff on the ground that it did not set forth a cause of action because plaintiff failed to exercise the diligence required to discover the facts on which the claim for relief is based prior to the judgment of the Court of Ordinary of August 15, 1959, or within three (3) years thereafter.

-5-

Because the Trial Court erred in sustaining the demurrers of Elvie Russell, Individually, Ruth Russell Howard and Everett Russell, and dismissing the petition of plaintiff on the ground that it did not set forth any cause of action because the judgment of the Court of Ordinary probating in solemn form the Will of Q. V. Russell, deceased, could not have been entered up without the evidence of E. L. Smith, W. M. Phillippe, Jr., and Mrs. Elvie Russell and it does not appear that those persons have been duly convicted of the perjury charged against them by the allegations of the petition.

-6-

Because the Trial Court erred in sustaining the demurrers of Ruth Russell Howard and Everett Russell and dismissing the petition of plaintiff on the ground that the petition collaterally attacks a judgment of the Court of Ordinary of Burke County and impugns the conduct of the Ordinary in the official affairs of his office and the Ordinary should be made a party to the suit.

And Now, within the time provided by law, comes the Appellant above named and files this her Enumeration of

Errors and prays that the errors complained of may be considered and corrected.

Post Office Address:

Thurmond, Hester, Jolles and
McElmurray,
By: Cornelius B. Thurman, Jr.,
Southern Finance Building,
Augusta, Georgia,

Post Office Address:

Thomas M. Odom,
Millen, Georgia,
Attorneys for Appellant.

I do hereby certify that a copy of the within and foregoing Enumeration of Errors has been filed with the Clerk of the Trial Court, Burke County, Georgia, simultaneously with the filing of same with the Clerk of the Supreme Court of Georgia. I do further certify that I have served a copy of same upon George W. Fryhofer, 114 East Sixth Street, Waynesboro, Georgia, as Attorney of Record for Appellee Oliver O. Russell, R. U. Harden, Waynesboro, Georgia, as Attorney of Record for Appellees Ruth Russell Howard and Everett Russell, E. D. Fulcher, 520 Greene Street, Augusta, Georgia, as Attorney of Record for Appellee Elvie Russell, Individually, and John D. Capers, Marion, Building, Augusta, Georgia, as Attorney of Record for Appellee Elvie Russell in her representative capacity as Executrix of the Estate of Q. V. Russell, deceased, by United States Certified Mail, to the post office addresses stated, with sufficient postage affixed.

This 7 day of June, 1966.

Cornelius B. Thurmond, Jr.,
Attorney for Appellant.

719 to 3

In the Supreme Court of Georgia, 23576.

(Decided Sep. 9, 1966.)

Marshall v. Russell, Executrix, et al.

1. Where a judgment of the court of ordinary shows on its face that there was jurisdiction of the parties and subject matter of a probate proceeding, the law presumes that the court did all that the law requires in admitting the will to probate.

2. The allegations in plaintiff's petition are insufficient to show that the judgment of probate was procured by fraud on the court of ordinary through perjured testimony where there is no allegation that those charged with perjury have been indicted and convicted of such offense.

3. Where plaintiff's petition fails to allege any diligence in discovering facts which she now alleges entitle her to have a judgment of the court of ordinary set aside and no reason is given why such facts were not discovered during the probate hearing and the seven years after said judgment was rendered, nothing is alleged to toll the statute of limitation, and the court did not err in dismissing plaintiff's petition on general demurrer.

Argued July 11, 1966—Decided September 9, 1966—Rehearing denied September 22, 1966.

Equitable petition. Burke Superior Court. Before Judge Kennedy.

Thurmond, Hester, Jolles & McElmurray, Cornelius B. Thurmond, Jr., Thomas M. Odom, for appellant.

George W. Fryhofer, R. N. Harden, Fulcher, Fulcher, Hagler, Harper & Reed, E. D. Fulcher, Cumming, Nixon, Eve, Waller & Capers, John D. Capers, for appellee.

Almand, Justice. This appeal is from an order sustaining the general demurrers to a five-count petition. The

general allegations of all the counts are the same. They are: Q. V. Russell, the father of the plaintiff and appellant, procured the preparation of a mutual will for himself and his wife, Elvie Russell, one of the defendants, on August 20, 1946; said mutual will was the result of an agreement between the husband and wife that "it should constitute a contract creating a remainder estate for the children named therein which said agreement and contract could not be changed by either one of them after the death of the first of them and under which the survivor of them would equally divide the estate among their said children, share and share alike"; Q. V. Russell died on June 26, 1959; Elvie Russell presented the purported will for probate in common form on July 6, 1959, and subsequently presented the will for probate in solemn form. Attached to the petition as exhibits were copies of, (1) the proceeding for probate in common form, (2) the purported will, and (3) the proceeding for probate in solemn form.

The mutual will provided that the survivor should receive all the properties of the party dying first and named the survivor as sole executor. The will shows that it was executed by both parties in the presence of three named witnesses on August 20, 1946, and duly attested by three witnesses. The petition for probate in solemn form named the four children and the surviving wife, all of whom waived all service, citation and process and agreed "that said proceeding to probate in solemn form may be instanter or at any time."

The record contains an affidavit sworn and subscribed to before the Ordinary of Burke County, by E. L. Smith and W. M. Phillippe, dated August 15, 1959, in which they swore that the will of the testator was signed by him in their presence and they subscribed their names as witnesses in his presence. Also dated the same day is the affidavit of Elvie Russell, sworn to before the ordinary in which she swore the will was signed by her and by the

testator in the presence of each other and the three witnesses, and that the third witness, Delia Holley, is now a resident of the State of Tennessee. On August 15, 1959, the ordinary in an order reciting that "it appearing to the satisfaction of this court by the testimony of the witnesses to this will, E. L. Smith and W. M. Phillippe, Jr., that this paper is the last will and testament of Quiller V. Russell and that he was competent to make a will at the time he signed and executed the same," the will was admitted to record. Letters testamentary reciting that the will was legally proved in solemn form on August 15, 1959, were issued to Elvie Russell.

On March 5, 1966, Geneva R. Marshall filed her petition naming as defendants Elvie Russell, individually and in her representative capacity as executrix of the estate of Q. V. Russell, and the three surviving children of the testator. It was prayed, among other things, that the judgment of the court of ordinary dated August 15, 1959, probating the last will and testament of Q. V. Russell in solemn form be declared null and void. It was alleged that Delia Holley signed her name as a witness before either the testator or his wife signed and not in the presence of the other witnesses; that witness Phillippe did not subscribe his name in the presence of the other witnesses; and that the testator did not sign his name in the presence of witness Smith.

The petition also alleged that at the time the appellant's signature was procured by her mother for probate in solemn form she "represented to plaintiff [appellant] that the said purported mutual will, a copy of which is hereto attached as Exhibit C, was the result of the prior agreement and contract hereinbefore alleged made prior to the execution of the said purported will and under which the said Q. V. Russell and the defendant Mrs. Elvie Russell agreed to distribute the estate to each of their four (4) children hereinabove alleged on an equal basis, share and

share alike. That in reliance upon such statement, which statement was made by defendant Mrs. Elvie Russell to plaintiff and in the presence of the attorney for Mrs. Elvie Russell, individually and as executrix, the said Carlton G. Mathews, Jr., the said plaintiff affixed her signature to the waiver of service to the application for the probate in solemn form. That from the time of the probate the said purported will in solemn form on the 15th day of August, 1959, the said defendant Mrs. Elvie Russell did attempt to and did carry out the agreement made between her and the said Q. V. Russell in that the said defendant Mrs. Elvie Russell divided the estate equally among the four (4) children up until on or about the 27th day of July, 1964, at which time the said defendant, Mrs. Elvie Russell filed action in Burke County Superior Court, being Case Number 570, in which she sought to have the said purported last will and testament of the said Q. V. Russell construed." Plaintiff alleged that she did not discover until January 3, 1966, from one of the witnesses to the will that the will was not properly executed.

The several counts alleged that the judgment of probate in solemn form was void because, (a) it was not witnessed legally, (b) there was no showing that the mutual will had not been revoked by Elvie Russell, (c) the said probate was procured by the fraud of Elvie Russell on the court of ordinary in that she knew the will had not been properly executed and she concealed this fact from the court, and (d) the affidavits of the witnesses Smith and Phillippe did not constitute legal testimony in the proof of the execution of the will.

Among the grounds of the general demurrer which the court sustained were, (a) the action was barred by the statute of limitation (Code, § 3-702), (b) the plaintiff had failed to exercise diligence required by law for the discovery of facts upon which she bases her claim for relief, and (c) "because said petition in its entirety and said

counts separately do not set forth any cause of action against this defendant because the judgment of the court of ordinary ordering to probate in solemn form the will of Q. V. Russell on August 15, 1959, could not have been entered up without the evidence of E. L. Smith, W. M. Phillippe, Jr., and Mrs. Elvie Russell, and it does not appear that these persons, charged with perjury by the allegations of the petition, have been thereof duly convicted." We are of the opinion that all of these grounds were well taken.

1. The judgment of the court of ordinary probating the will of Q. V. Russell in solemn form shows on its face that the court had jurisdiction of the parties and subject matter. The authority to act being shown, the law presumes that the court of ordinary in admitting the will to record did all that the law requires to be done, and the superior court in a collateral proceeding will not go behind that judgment. Clements v. Henderson, 4 Ga. 148, 154 (48 AD 210); McDade v. Burch, 7 Ga. 559, 562 (50 AD 407); Davie v. McDaniel, 47 Ga. 195 (1, 2). "The court of ordinary is a court of general jurisdiction, and therefore it is presumed in favor of one of its judgments that every fact necessary to make it valid and binding upon the parties thereto and their privies was before the court." Stuckey v. Watkins, 112 Ga. 268 (1) (37 S. E. 401). "In the absence of a statute requiring it, judgments of courts of general jurisdiction of the subject matter and the parties need not have set forth therein the evidence upon which they are based." McFarland v. McFarland, 143 Ga. 598 (2) (85 S. E. 758).

2. The allegations of the petition are insufficient to show that any fraud was practiced upon the appellant by her mother, Elvie Russell, at the time appellant acknowledged service and signed the waiver in the probate of the will in solemn form. Appellant's mother, under the allegations of the petition, did nothing to prevent or deter anyone

from caveating the will in 1959 when it was offered for probate.

The chief allegation of fraud is that the mother knew that the will had not been properly executed and silently permitted witnesses Smith and Phillippe to falsely swear and that she falsely swore as to its execution, and therefore the mother committed fraud on the court of ordinary in leading the court to render a judgment on false testimony. Though a judgment obtained as a consequence of corrupt and wilful perjury may be set aside, before it can be done, it must be shown that the person charged with such perjury has been convicted thereof. Code, § 110-706. Compare Bird v. Smith, 186 Ga. 301 (2, 3) (197 S. E. 642), where it was held: "An allegation in a petition, that the defendants 'falsely represented to the court of ordinary that the testator was seventy-nine years old when he executed said will, that he had suffered a stroke of paralysis a short time before executing his will, and that testator at the time he signed said will did not possess sufficient mental capacity to make a will, and by said false and fraudulent representation did obtain a judgment in the court of ordinary sustaining the caveat, and that said judgment was obtained through fraud perpetrated upon the plaintiff,' in an allegation that the judgment complained of was obtained by reason of perjured testimony given by the defendants. The instant case being a petition to have set aside the judgment of the court of ordinary, under the allegation above quoted, which we have held to be an allegation that the judgment was obtained by reason of perjured testimony, and there being no allegation that the defendants, who are alleged to have testified falsely, have been indicted and convicted, a general demurrer to the petition should have been sustained. Elliott v. Marshall, 182 Ga. 513 (185 SE 831), and cit."

3. "The judgment of a court of competent jurisdiction may be set aside by a decree in equity, for fraud, acci-

dent, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant." Code, § 110-710. "All proceedings of every kind in any court of this State to set aside judgments or decrees of the courts, shall be made within three years from the rendering of said judgments or decrees." Code, § 3-702. "Where it was sought to have the court of ordinary revoke and set aside the probate of a will in solemn form, on the petition of one who had been served and was a party to the proceedings to admit the will to probate, such application should have been made within three years from the rendering of the judgment sought to be vacated." Speer v. Speer, 74 Ga. 179 (1).

The case of Hightower v. Williams, 104 Ga. 608 (30 S. E. 862), on its facts is nearly identical with the factual situation here. There one of the heirs of the testator sought to set aside in the court of ordinary the probate of the will in solemn form. He alleged in his petition "that the testator was induced by undue influence to sign the will; that the will was not properly attested; that certain of the subscribing witnesses did not see the will signed by the testator and did not sign it in his presence; that the judgment of probate was obtained by fraud of the sole legatee and of her attorney; and that these facts were unknown to petitioners until after the judgment and until a few days before the filing of the present petition". Id., p. 609. In holding that the court did not err in directing a verdict for the defendant, this court in an unanimous opinion said: "These plaintiffs in error were served with notice of the intention of the executor to probate the will in solemn form at a certain time and place. They failed to appear and file a caveat to the proceeding. They now seek to set aside the judgment of the court of ordinary, by attempting to prove the facts set out in their petition; but one of the main facts necessary to establish in a proceeding to set aside the judgment, they neither allege nor

attempt to prove. They do not allege or attempt to show any diligence on their part to discover, before the judgment was rendered, the facts now recited in their petition. A judgment against a party may be set aside for proper cause; but he must always show, not only that the judgment was improperly granted, but that he did not, at the time it was granted, know of his defense, and could not have ascertained it by the exercise of proper diligence on his part. The plaintiffs here alleged in their petition and proved at the trial that, until a short time before they filed their petition, they did not know of the defense which they might have made to the probate of the will; but nowhere is it alleged or proved or attempted to be proved that, before the probate, they exercised any sort of diligence to discover the facts now set up. Had they, before the probate of the will, gone to the subscribing witnesses and the latter were truthful men, an inquiry of them as to the facts of the attestation of the will would have brought out the facts to which some of them now testify. It seems to us that the lowest degree of diligence would have required children who had been disinherited by their father to have seen the witnesses to his will and to have inquired about all the facts of its execution. This the petitioners did not do; nor do they attempt to explain their failure to do so. They did not even attend the court as they were summoned to do, and examine the witnesses to the will when the latter was before the court for probate. Had they done this they might, so far as the record discloses, have discovered the facts upon which they now rely to set aside the judgment. As before remarked, while the judgment of a court may be set aside for proper cause, it will not be done if the party complaining does not show proper diligence in discovering or attempting to discover the facts upon which he relied to annul the judgment." Id., pp. 609, 610.

What the court said in the Hightower case, 104 Ga. 608, supra, as to the failure of the moving party to use the

slightest degree of diligence, is applicable here. Appellant was made a party to the proceeding to probate the will of her father on August 1, 1959. The facts upon which she bases her claim that such probate judgment be set aside could have been ascertained by her own diligence. In her petition she alleged that it was not until January 3, 1966, that she discovered and learned from W. M. Phillippe, Jr., that the will was not properly executed by either Q. V. Russell or Elvie Russell. No reason is given why she could not have ascertained these facts on the probate hearing or during the nearly seven years lapse of time after such hearing. "A petition seeking to set aside a judgment of the court or ordinary, discharging an executor, brought 13 years after such discharge, which did not contain specific allegations of actual fraud on the part of the executor deterring and debarring the plaintiffs from sooner instituting the action so as to toll the statute of limitations, was subject to dismissal on general demurrer." Warnock v. Warnock, 206 Ga. 548 (1) (57 S. E. 2d 571).

It was not error to sustain the general demurrer and dismiss the petition.

Judgment affirmed. All the Justices concur.

JUDGMENT.

23576.

Supreme Court of Georgia.

Atlanta, September 9, 1966

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Geneva R. Marshall v. Elvie Russell, Extrx., et al.

This case came before this court upon an appeal from the Superior Court of Burke County; and, after argument

had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00.

Case No. 23,576.

In the Supreme Court of the State of Georgia.

Geneva R. Marshall,
Appellant,

vs.

Elvie Russell, Individually and in Her Representative Capacity as Executrix of the Estate of Q. V. Russell, Deceased, Everett Russell, Ruth Russell Howard and Oliver O. Russell,
Appellees.

Appeal From the Superior Court, Burke County, Georgia, Augusta Circuit.

Motion for Rehearing by Appellant.

Now comes Geneva R. Marshall, Appellant in the above styled case, hereinafter referred to as Movant, and within the time allowed by law, moves for a rehtaring and reversal of the decision rendered by this Court on the 9th day of September, 1966. The decision of the Court herein was contrary to the contentions of movant and she respectfully shows to the Court that in rendering said decision the Court overlooked certain material facts in the record and certain decisions, statutes and provisions of the Constitution of Georgia, which are controlling as authority and which require a different judgment from that rendered; and further that the Court erroneously construed

or misapplied certain provisions of law and certain controlling authorities hereinafter set forth.

Preliminary Statement.

The petition alleges that one Testator of a joint mutual Will died leaving his widow, the other Testator to the said joint mutual Will, and four (4) children, and that this Will was the result of any agreement between the Testator and his wife that it would constitute a contract creating a remainder estate for the children named therein, and that after the death of the first of them, the survivor would equally divide the estate among their said chlidren, share and share alike, that the defendant wife was a party to the agreement and understood the agreement, that the Testator procured the Will prepared to be the joint mutual Will of he and his wife, but that in the execution thereof, all of the witnesses to the Will signed at a time prior to the time the Testator signed and all of said witnesses to the Will signed at a time prior to the signature of the surviving wife, that none of the witnesses signed in the presence of the surviving Testator, nor did the deceased Testator sign in their presence or prior to their signature or ever acknowledge a signature to them nor did the surviving Testator sign in their presence or prior to their signature or ever acknowledge her signature to them, that the Will was probated in common form wherein the surviving Testator was represented by an Attorney at Law and in connection with the procuring of a waiver of service, citation and process so as to probate the said Will in Solemn Form in vacation and without delay, that the surviving Testator individually and acting in her then representative capacity as Executrix, represented to the plaintiff that the said joint mutual Will was the result of this prior agreement and contract under which the surviving Testator agreed to distribute the estate to each of the four (4) children on an equal basis

and that in reliance upon said representation from the surviving Testator, the plaintiff in the presence of said surviving Testator and in the presence of her attorney signed the said waiver of service to the application for the probate in Solemn Form, that the mutual Will was probated in Solemn Form as to the deceased on August 15, 1959, and from that date until on or about July 27, 1964, the surviving Testator carried out the agreement made between her and the deceased Testator and divided the estate equally among the four (4) children, that the surviving Testator repudiated the agreement and contract on or about the 27th day of July, 1964, at which time the surviving Testator brought suit against the plaintiff and her sister and brothers to have the Will construed, that in repudiation of the contract and agreement between the surviving Testator and the deceased Testator, the surviving Testator did convey certain properties to two (2) of the four (4) children to the exclusion of the other two (2) children, one of whom is the plaintiff, that the surviving Testator knew that the signature of the first witness to the will was placed thereon at a time prior to the time either she or the deceased Testator executed the Will and that at the time of the probate of the Will in common form, the surviving Testator and her attorney at law knew that the paper purporting to be the Will had not been executed with the formality required by law and was not in fact valid as either the mutual Will of she and the deceased or the Will of the deceased Testator, and that this constituted a fraud on the Court of Ordinary and upon the plaintiff such as to make the Order of Probate in common form void, that at the time of the proceeding to probate the Will in solemn form, the surviving Testator and her attorney knew that the paper had not been executed with the formality required by law and was not in fact or law valid as either the mutual Will of the deceased and the surviving Testator or as the individual Will of the deceased and that this was a fraud on the Court of Ordinary

and upon the plaintiff, that the acknowledgment, waiver and assent to probate the Will in solemn form had been give in reliance upon the representation of the surviving Testator to the plaintiff that the surviving Testator would carry out the terms of the contract and agreement between she and her deceased husband (plaintiff's father) under which the plaintiff was a beneficiary and that in consequence of this representation the plaintiff executed the assent and acknowledgment and by reason thereof has suffered the detriment alleged (the favoring of two (2) children to the exclusion of plaintiff) and that it was not until the 3rd day of January, 1966, that plaintiff learned from one of the witnesses to the Will that it was not properly executed as to either the deceased Testator or the surviving Testator, that there were and are considerable properties in the estate of the deceased Testator consisting of land and money in the possession of the surviving Testator and the other defendants and that plaintiff feared that the defendant would dispose of or encumber those properties and money to her further detriment, she being entitled to a one fifth (1/5) interest in the estate of the deceased tesator by virtue of the fact that the deceased died intestate, that the judgment of probate in solemn form is void as a matter of law because the Will shows that it was executed in the presence of three (3) witnesses and the order of probate in solemn form shows on its face that the Will was proved on the testimony of only two (2) of the witnesses and the law of Georgia requires a Will probated in solemn form to be proved by the testimony of all the witnesses thereto, and because under Code of Georgia 113-104, the revocation of one mutual Will shall be the revocation of the other and the order of probate in solemn form shows on its face that the paper offered for probate was considered only as it concerned the deceased testator and no evidence was heard by the Court with reference to whether or not the said joint mutual Will had been revoked by the surviving testator because

if the surviving testator had revoked it, such revocation would as a matter of law have revoked the paper as the Will of the deceased testator.

In addition thereto, the petition alleged in Count II (Record pages 16 and 17) that the probate in solemn form of the purported Will of the deceased testator was procured by the fraud of the surviving testator in that the surviving testator and her attorney remained silent before the Court and proceeded to probate the Will without the surviving testator being placed under oath and without being sworn as a witness and without giving oral testimony and that said silence and other acts were intentional on the part of the surviving Testator so as not to subject herself to possible perjury and to conceal from the Ordinary the true facts and that the surviving testator in so doing committed a fraud upon the Court of Ordinary and upon the plaintiff in that the surviving testator falsely and fraudulently misrepresented to the Court of Ordinary a fact necessary for the Court to obtain jurisdiction because she and her attorney represented to the Court that the deceased testator left a valid Will when she and her attorney knew as a matter of fact that the representation was false and that as a matter of law the purported Will was void and would not constitute a valid Last Will and Testament.

Count III of the petition, in addition to that alleged in Count I alleged additionally that the judgment of probate in solemn form was void because the Court of Ordinary of Burke County, Georgia, did not have jurisdiction of the subject matter because the orders of probate in solemn form was obtained by the fraud of the surviving testator and her attorney because the affidavit of the surviving testator to the petition for probate which alleged that "the decedent, during his life time, made and published as Last Will and Testament, * * *" did not constitute an affidavit as a matter of law because the surviving testator

was not sworn by the Notary Public at the time she gave the affidavit and therefore the application and petition to probate was not verified as required by law and the Court of Ordinary did not have jurisdiction to inquire into the subject matter, further that the waiver of service by plaintiff as an heir was obtained by the fraud of the surviving testator, that the affidavit of two (2) of the witnesses to the Will does not in law and in fact constitute and affidavit because the said witnesses were not sworn by the Ordinary at the time of executing the purported affidavit, that the affidavit of the surviving testator purportedly made before the Ordinary of Burke County, Georgia, was not in fact and law an affidavit because the surviving testator was not administered an oath and was not sworn at the time she gave said purported affidavit and that at no time in the proceedings to probate the Will of the deceased testator in Solemn Form were any witnesses placed under oath nor was there any oral testimony taken in the proceedings from either the surviving testator who was also the Executrix or from two (2) of the witnesses to the Will (Record pages 18 through 20).

Count IV of the petition (Record pages 21 and 22) in addition to the facts alleged in Count I alleged that the intent of the purported mutual Last Will and Testament of the deceased testator and the surviving testator was that the Will should be effective as to both or effective as to neither, and that the order of probate in solemn form by the Ordinary shows on its face that no testimony was taken as to whether the said joint mutual Will was properly executed by the surviving testator and that the deceased testator executed the said Will in consideration of the execution thereof by the surviving testator, that where one testator executes a mutual Will in consideration of the execution by the other and the Will of the survivor of the two is not duly executed that the consideration for

the execution by the deceased testator fails and the paper of the deceased cannot be legally probated as a Will because the failure of one testator to a joint mutual Will to execute the same with the formality required by law will as a matter of law make void the paper as the Will of the other testator.

Count V of the petition, in addition to the facts alleged in Count I, alleged additionally that the judgment of probate in solemn form is void as depriving the plaintiff of her property without due process of law and as violating and denying to plaintiff due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America for the reason that no oaths were administered to the affidavits of the surviving testator either on the probate in common form or on the probate in solemn form, and that no oaths were administered to the affidavits of two (2) of the witnesses to the said Will, that there was no evidence given in the proceedings of probate in solemn form as to the formality of execution of the joint mutual Will by the surviving Testator, that there was no oral testimony given by any witnesses in the proceedings to probate in solemn form as to the formality of execution by the deceased testator, that there was no oral testimony or evidence given as to the location or whereabouts or absence of the third witness to the Will and that plaintiff was deprived of her right and opportunity to cross-examine witnesses because there were no witnesses presented and no oral evidence taken on said proceedings to probate in solemn form.

Ground I.

This Honorable Court in Division 1 of its opinion held as follows:

"1. Where a judgment of the court of ordinary shows on its face that there was jurisdiction of the

parties and subject-matter of a probate proceeding, the law presumes that the court did all that the law requires in admitting the will to probate."

Movant respectfully contends that this portion of the opinion is in error because the Court overlooked the following material facts in the record and the following material statutes which are controlling as authority and which would require a different judgment from that rendered and has erroneously construed or misapplied the following cited and quoted provisions of law.

The cases cited by this Honorable Court in Division 1 of its opinion in the main deal with attempts to set aside consummated sales by executors or administrators for alleged technical defects and there appears to be no element of fraud alleged or involved in any of those cases and for such reason, movant contends that such cases, while stating good law under the facts of those cases, are not applicable to the instant case which alleges fraud in all of its five counts.

It is respectfully contended that this Honorable Court has overlooked **Code of Georgia 110-710** which allows judgments of Courts of competent jurisdiction to be set aside for fraud and the case of **Brown v. Anderson,** 13 Ga. 171 (2) to the effect that a probate in solemn form is conclusive unless procured by fraud and collusion. Of particular importance and overlooked by this Honorable Court is the case of **Rivers et al. v. Alsup,** 188 Ga. 75 wherein it was held that where an alleged false jurisdictional statement in the appointment of an administrator is knowingly made with such actual and positive fraud on the part of the adverse party, this would be an imposition on the Court and such a fraud as to authorize equitable interference.

This Honorable Court has overlooked the cases of **Loyless et al. v. Rhodes et al.,** 9 Ga. 547 and **Abercrombie et**

al. v. Hair et al., 185 Ga. 728, both of which cases dealt with mismanagement of estates and are analogous to the instant case for the reason that the defendant executor procured the probate upon the representation that she would carry out the terms of a contract made with the deceased testator prior to the execution of the will, that the will was procured in order to effectuate such contract and then after such representation, the defendant executor repudiated the contract as represented. It is also contended that this Honorable Court has overlooked the fact that defendant executor, who knew that the will was improperly executed, in her petition to the Court of Ordinary falsely represented that the decedent died leaving a Last Will and Testament. It must be presumed that as a matter of law, such representation must be held to mean that the petitioner verily believes that the will is valid and has no reason to believe that it is not valid.

Movant respectfully contends that this Honorable Court has overlooked Code of Georgia 110-709 and the case of **Carter v. Atkinson**, 12 Appeals 390, which held that the judgment of a Court having no jurisdiction of the person or subject matter or void for any other cause is a mere nullity, that a void judgment is no judgment and may be attacked in any Court by anybody.

Of particular importance, and a case which it is respectfully contended this Court has overlooked, is the case of **Langston v. Nash**, 192 Ga. 429 which was brought to set aside a judgment rendered thirteen (13) years earlier on the ground that the judgment was void because of lack of jurisdiction of the subject matter and in spite of the fact that the petitioner had sought to modify the judgment, had paid alimony pursuant to the judgment for several years, this Honorable Court held that such facts would not estop the petitioner from attacking the judgment.

It is also respectfully contended that this Honorable Court has overlooked those allegations in the petition to the effect that both the defendant executor and her attorney, who was then and there representing the estate and the defendant executor, had knowledge of all of the facts that the will had not been properly executed and would not be entitled to probate if the probate proceeding were correctly and properly handled and that the knowledge of this by the attorney is the knowledge of the client and that fraud which would authorize the setting aside of a verdict can be the fraud of the respondent or his counsel under the authority of **Ketchum v. Ketchum**, 191 Ga. 140 which it is respectfully contended that this Court has overlooked.

It is also respectfully contended that this Honorable Court has overlooked, misconstrued and misapplied those citations with reference to the fact that a will cannot be probated in solemn form on affidavits in light of the allegations in the petition that the two witnesses were not sworn and the affidavit is not in law or fact the affidavit which purports to be and that even if it were an affidavit, a will may not be probated in solemn form upon affidavits. It is contended that this Court has overlooked Code of Georgia 113-602 requiring witness proceedings in the probate of a will and overlooks the holdings in **Brown, et al. v. Anderson, et al.**, 13 Ga. page 171, to the effect that all parties at interest have the privilege of cross-examination at these witness proceedings and the case of **Miller v. Miller**, 104 Ga. Appeals 224, which holds that these witnesses must be introduced for examination even though the propounder knows that their testimony will be unfavorable to him.

Of particular importance, movant contends that this Honorable Court has overlooked, misconstrued and misapplied those cases and Code Sections cited in movant's brief to the effect that proof that a judgment is void may be shown by defects on the face of the record or from

failure of other facts to appear in the record. In connection with this, movant contends that this Honorable Court particularly overlooked the mandate of Code of Georgia 113-104 and its effect upon the probate of joint mutual wills. This Code Section provides that the revocation of one mutual will shall be the destruction of the other.

The face of the record (Page 33) shows that the joint mutual will offered for probate was inquired into and considered only as it concerned the deceased testator and no evidence was heard by the Court with reference to the question of whether or not the surviving testator had revoked the will. Since under the Code of Georgia 113-104, had the surviving testator revoked the will as to herself, such revocation would have revoked it as to the deceased testator, then the burden of proof on the propounder of a joint mutual will must show as a necessary part thereof the the surviving testator has not revoked it. The record is silent as to the fact of revocation or the fact of revocation or the fact of nonrevocatiaon of this joint mutual will by the surviving testator. The record is silent as to whether or not the attestation of this joint mutual will was proved as to both the deceased and the surviving testators. Movant contends that this Honorable Court has overlooked the case of **Jones v. Bibb Brick Company**, 120 Ga. 321, on page 327 wherein it is held that the proof necessary to show a judgment to be void may consist of the failure of certain operative facts to appear in the record. The face of the record in this case is silent as to those items mentioned and the silence of the record proves that the Court of Ordinary in this case lacked jurisdiction of the parties and the subject matter and the presumption that the Court did all that the law required has no application when considered in the light of the facts alleged.

It is also respectfully submitted that this Honorable Court has overlooked the Code Sections and cases cited

to the proposition that a void judgment of the Court of Ordinary may be set aside either by direct or collateral attack where fraud is involved because the cases cited in Division 1 of the opinion contain no elements of fraud and seek to collaterally attack the judgments concerned therein on technicalities. The instant case is permitted under Code of Georgia 37-219, which movant contends this Court has overlooked, misconstrued and misapplied as well as under the ruling of **Anderson v. Hale,** 209 Ga. 307, wherein the Honorable Court held that a Superior Court may set aside as void the judgment of a Court of Ordinary where an allegation of fact in a petition to the Court of Ordinary, necessary to give the Court jurisdiction, was known by the peitioner to be false and was a fraud on the Court. To the same effect, see the cases of **Hamilton v. Bell, et al.,** 161 Ga. 739, **Abercrombie v. Hair,** 185 Ga. 728, and **Bowers, Administrator v. Dolen,** 187 Ga. 659, all of which it is contended that this Honorable Court has overlooked, misconstrued and misapplied to the facts alleged in the intant case.

Ground II.

This Honorable Court in Division 2 of its opinion held as follows:

> "2. The allegations in plaintiff's petition are insufficient to show that the judgment of probate was procured by fraud on the court of ordinary through perjured testimony where there is no allegation that those charged with perjury have been indicted and convicted of such offense."

Movant respectfully submit and contends that this Honorable Court has misconstrued the allegations of the petition. There is no allegation in the petition that the probate in solemn form was obtained by the perjury of the two witnesses or upon the perjury of any person or

witness. The allegation referred to is paragraph 2 (e) of Count III (Record Page 19) and is to the effect that the witnesses Smith and Phillippe were not sworn to the affidavit and that what purports to be an affidavit is not in fact or law an affidavit.

This Honorable Court in Division 2 of its opinion makes a finding of fact that "the mother knew that the Will had not been properly executed and silently permitted **witnesses Smith and Phillippe to falsely swear** and that **she falsely swore** as to its execution" (Emphasis supplied).

There are no allegations that there was false testimony or that any witness made a false oath. The allegations of the petition are to the effect that since no oath was administered, then the affidavit is not what it purports to be and since no oral testimony was had of any nature, there was no testimony to support the probate and consequently, no one falsely testified for the simple reason that no one testified. The petition alleges that the defendant executor, knowing of the invalidity of the attestation of the will, that she and her attorney remained silent and proceeded to probate the will without being placed under oath and that this silence, coupled with the knowledge of the invalidity of the attestation, was intentional on the part of defendant executor so as not to subject herself to possible perjury and that this intentional silence constituted a fraud upon the Court and upon the plaintiff. This is a far cry from alleging perjury. The case of **Byrd v. Smith**, 186 Ga. 301 (2 and 3), is easily distinguishable because the false and fraudulently representations which appeared in that case had the operative effect of procuring a judgment sustaining a caveat to a will. The caveat of a will is an adversary proceeding. There must be testimony heard on a caveat or the caveator does not carry the burden of proof. This is greatly different from the friendly and permissive pro-

bate of a will by members of the family of the deceased.

Movant respectfully contends that this Honorable Court has misconstrued the facts alleged in the petition and has wrongfully construed them to allege perjury whereas the allegations do not allege perjury, and having so misconstrued these allegations which are allegations of fraud, has misapplied Code of Georgia 110-706 and the case of **Byrd v. Smith**, 186 Ga. 301, to such facts and that a proper construction would require a different judgment from that rendered.

Ground III.

This Honorable Court in Division 3 of its opinion has held as follows:

> "3. Where plaintiff's petition fails to allege any diligence in discovering facts which she now alleges entitled her to have a judgment of the court of ordinary set aside and no reason is given why such facts were not discovered during the probate hearing and the seven years after said judgment was rendered, nothing is alleged to toll the statute of limitations, and the court did not err in dismissing plaintiff's petition on general demurrer."

Movant respectfully contends that this Honorable Court has overlooked the following material facts set forth, the following statutes and decisions which are controlling as authority and which as applied to this case require a different judgment from that rendered, and that this Honorable Court has erroneously construed or misapplied the said statutes and decisions and controlling authorities, said facts, controlling statutes and decisions being expressly pointed out by reference thereto.

Movant contends that Code of Georgia 3-702 has been misapplied as to the allegations of this case in light of the holding of this Honorable Court in **Ivey v. State**

Mutual Insurance Company, et al., 200 Ga. 835, which held that said Code Section has no application to an equitable proceeding to set aside a judgment which is void on the face of the record because of lack of jurisdiction of a person. If lack of jurisdiction of a person is sufficient, then lack of jurisdiction of the subject matter is also sufficient and for the reasons herein specified. The Court of Ordinary of Burke County, Georgia, had no jurisdiction of the subject matter of the petition for probate in solemn form in this case because of the reasons herein pointed out. Movant respectfully contends that this Court has also overlooked the confidential relationship existing between the plaintiff and defendant executor which would require a right in the plaintiff to expect a full revelation of all pertinent facts which might jeopardize the plaintiff's property rights and that the failure of defendant executor to reveal the facts alleged with reference to the void attestation of the Will in and of itself amounts to such fraud as extends the right of the plaintiff to bring proper action at any time within the period of limitations after the discovery of the fraud. Movant contends that in not finding a confidential relationship between the plaintiff (daughter) and defendant executor (mother) in this case, that this Honorable Court has overlooked, misconstrued and misapplied the cases of **Head v. Holcombe, Administrator**, 158 Ga., page 94 and **Brown v. Brown**, 209 Ga., page 620.

Movant respectfully contends that this Honorable Court has also overlooked, misconstrued and misapplied the case of **Morris, et al. v. Johnstone, et al.**, 172 Ga. 598, wherein this Court has held that an administrator occupies the position of the highest trust and confidence to the heirs at law, and since plaintiff is an heir at law of the deceased, and the defendant executor was in fact and at that time qualified as an executor, that the defendant executor must and should have exercised the utmost of good faith in her dealings with the plaintiff.

Movant respectfully further contends that this Honorable Court has overlooked, misconstrued and misapplied its ruling in the case of **Poullain, et al. v. Poullain,** 76 Ga., page 420, which holds that concealment per se amounts to actual fraud where one party has a right to expect full communication of the facts from another. There can be no question but that the plaintiff in this case had a right to expect full communication of the facts with reference to the probate and the other matters alleged from her mother, the defendant executor.

Movant also contends that this Honorable Court has overlooked, misconstrued and misapplied the case of **Miller v. Miller,** 104 Ga. App. 224, wherein the Court of Appeals held that lack of diligence should not be applied to a plaintiff who acknowledges service of the application to probate a Will in Solemn Form where the petition affirmatively alleges that the judgment is void in that the subscribing witnesses were not produced as witnesses as required by law and that upon general demurrer, treating the allegations of petition as true, the face of the petition shows that the judgment of probate in Solemn Form was void. Such case movant contends was misapplied and overlooked by this Honorable Court in its consideration of the facts alleged in the instant petition.

Movant contends that this Honorable Court has overlooked, misconstrued and misapplied to the facts of this petition Code of Georgia 37-703, which provides that misrepresentation of a material fact made wilfully to deceive and acted on by the opposite party constitutes legal fraud as it is applied to the proposition that on the question of diligence, where there exists a relation of trust and confidence between the party committing the fraud and the party who is affected by it, that this failure to use diligence may be excused where it appears that it was through confidence and the acts of the party who com-

mitted the fraud that the other was prevented from discovering it.

Movant respectfully contends that this Honorable Court has misconstrued, and misapplied the case of **Elliott v. Marshall,** 179 Georgia 639, wherein this Court held that a person is not bound to exhaust all means of his command to ascertain the truth before relying upon representations. With reference to the case of **Spear v. Spear,** 74 Georgia 179 (1), cited in support of Division 3 of its opinion, movant contends that this Court has misapplied said decision because in the **Spear case** there was a jury trial and upon facts and testimony appearing in the record of that case, the jury had resolved the question of fraud in favor of the respondent and this Court held in the **Spear case** that it was satisfied from the record that the facts contained therein showed no fraud. Movant further respectfully contends that this Honorable Court has overlooked, misconstrued and misapplied those cases holding that ordinarily the question of proper diligence is for determination by a jury, see **Elliott v. Marshall,** 179 Georgia 639, and **City of Dalton v. U. S. Fidelity Insurance Co.,** 216 Georgia 602.

Of particular importance, movant contends that this Honorable Court has overlooked, misconstrued and misapplied the decisions hereinafter cited in considering the facts alleged in the petition in this case to the proposition that where there are facts involving fraud, and excuses for delay in discovering the fraud, that the question presented is one of mixed law and fact and is a proper question for a jury on proper instructions from the Court and not as a matter of law on demurrer. Movant contends that this Honorable Court has overlooked particularly the case of **Morris, et al. v. Johnstone, et al.,** 172 Georgia 590, which holds that if the question is simply one of length of time elapsing between the accrual of the action and the institution of a suit, it is properly con-

sidered as a matter of law, but where there are facts involving fraud and excuses for delay in discovering it, the question is one of mixed law and fact and is for determination by the jury under proper instructions from the Court.

This Honorable Court holds in Division 3 of its opinion that no reason is given why the facts surrounding the attestation of the Will were not discovered during the probate hearing and the seven years after judgment was rendered. The petition **does allege** why the facts were not discovered during the probate hearing because the petition clearly and unequivocally alleges that the Will was probated on an affidavit which in fact was not an affidavit and that no witnesses were sworn and that no testimony was heard. If the witnesses to the Will had been sworn and had given oral testimony to the Ordinary, the improper attestation would have appeared at that time and it must be presumed that the Ordinary would have refused to probate the Will in Solemn Form. As to why the facts were not discovered for seven years after the judgment was rendered, until the defendant executor (the mother) repudiated the agreement to divide the deceased testator's estate equally between the children, there was no reason to question her acts or motives or to question the attestation of the Will upon which she represented the agreement was based and that the Will was prepared so as to carry out the agreement. This Honorable Court in Division 3 of its opinion holds that the case of **Hightower v. Williams**, 104 Georgia 608, is on its facts nearly identical to the factual situation here. Movant respectfully contends that such case is not identical and that the case is distinguishable for the simple reason that **in the Hightower case, the children were disinherited by their father.** The petition in the instant case shows no such disinheritance in favor of a stranger to plaintiff and her brothers and sister. On the

contrary, the petition alleges that the widow acknowledged to the children that there was a contract and agreement between she and their father that the survivor of them would distribute the property equally among the children and that the purpose of the joint mutual Will was to facilitate and effectuate this contract. **These are allegations of inheritance and not allegations of disinheritance,** and movant earnestly and respectfully contends that for this reason, the **Hightower v. Williams case** is not authority for the ruling here.

Where in the petition are there alleged any facts to require the application of diligence as between mother and children in this case? Movant contends that the Court has overlooked the decision of **Head v. Holcombe,** 158 Georgia 94, to the effect that slight fraud between parent and child may be of itself sufficient to set aside a transaction and that this Court has misconstrued this decision and misapplied it to the facts of this case.

What in the world could this plaintiff have done under the facts of this case? Should this plaintiff have questioned the truth of her mother's representations, questioned the witnesses to the Will, and poked and probed into the method and manner in which a duly licensed attorney handled the proceeding for probate in Solemn Form? For this plaintiff to have questioned the witnesses, question her mother's motives, questioned the truth of her mother's representations and questioned particularly the fact of the mother carrying out the agreement during the five years after the probate, would have alienated the feelings of the mother and the brothers and sister to such an extent, that the family harmony and accord would have been in constant turmoil.

For the reasons stated, movant respectfully contends that this Court has overlooked the above referred to facts, controlling ordinances and statutes and has miscon-

strued said facts, controlling ordinances, statutes and decisions cited which would require a different judgment from that rendered.

Ground IV.

Movant respectfully contends that this Honorable Court overlooked the following material facts set forth, the following statutes and decisions which are controlling as authority and which would as applied to this case require different judgment from that rendered and that this Honorable Court has erroneously construed or misapplied the said statutes and decisions and controlling authorities, said facts, controlling statutes and decisions being expressly pointed out by reference thereto.

Count IV of the petition (R-21 and 22) alleges that the purported mutual Last Will and Testament shows that it was the intent of both testators that the Will should be effective as to both testators or effective as to neither, that the order of probate in solemn form shows on its face that no testimony was taken as to whether the Will was properly executed by the surviving testator, that the deceased testator executed in consideration of the execution by the surviving testator and that where one testator of a mutual Will executes the same under such circumstances and where the Will of the survivor is not duly executed, that the consideration for the execution of the Will by the deceased fails and the Will of the deceased cannot be legally probated and that as a matter of law because the Will is void as to the surviving testator, it is void as to the deceased testator.

Movant respectfully contends that this Honorable Court has overlooked, misconstrued and misapplied its ruling in **Clements v. Jones**, 166 Georgia 738, to the effect that equity will interpose to prevent fraud in the cases of mutual Wills which are the result of a contract based upon

valid consideration where after the death of one testator, the survivor has accepted benefits under the Will.

Joint mutual Wills are rare and are not everyday occurrences. Movant contends that this Honorable Court has completely and entirely overlooked that special branch of law which applies only to joint mutual Wills as we have in this case. Movant contends that this Honorable Court has overlooked the positive mandate of Georgia Law to the effect that the revocation of one mutual Will is the destruction of the other. Particularly, has the Court overlooked, misconstrued and misapplied the case of **Burkhart et al. v. Rogers, et al.**, Supreme Court of Okla., 273 Pacific, page 246, and particularly the landmark case on the subject of **Martin v. Helms et al.**, decided by the Supreme Court of Illinois and reported in 149 N. E. Reporter, page 770. This case of **Martin v. Helms, et al.**, must be considered as persuasive authority upon this Honorable Court inasmuch as the question has not been previously presented in Georgia. The **Martin v. Helms case** held that where there is a joint mutual Will of husband and wife, the husband is deceased and the attestation by the wife is invalid, that the Will is also invalid as to the husband since he executed it in consideration of the wife's promise to execute and as she failed to keep her promise, the consideration of the husband's execution also failed.

The petition in this case clearly alleges that all of the purported witnesses to the Will executed the paper at a time prior to the time that the surviving testator executed it. The surviving testator is in life. It is apparent on the face of the petition that the Will cannot be legally probated as the Will of the wife and since it cannot be so probated, the consideration supporting the husband's execution has failed and the Will is invalid as to both.

Movant respectfully contends that this Honorable Court has overlooked the above referred to facts, controlling

ordinances and statutes and has misconstrued said facts, controlling ordinances, statutes and decisions cited which would require a different judgment from that rendered.

Ground V.

Movant respectfully contends that this Honorable Court has overlooked the following material facts set forth, the following statutes and decisions which are controlling as authority and which would as applied to this case, require a different judgment from that rendered and that this Honorable Court has erroneously construed or misapplied the said statutes and decisions and controlling authorities, said facts, controlling statutes and decisions being expressly pointed out by reference thereto.

Count V of the petition (Record pages 23 and 24) alleges that the judgment of probate in Solemn Form deprives the plaintiff of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America for the reason that no oaths were administered to the Executor, no oaths were administered to the affidavits of the witnesses, no oaths were administered to any witnesses, no evidence was given in the proceedings of probate, no oral testimony was taken and that therefore, the plaintiff was deprived of her right and opportunity to cross-examine the witnesses because there were no witnesses.

Movant contends that this Honorable Court has completely overlooked the Fourteenth Amendment to the Constitution of the United States of America for the reasons stated and by reason thereof, has erroneously construed and misapplied the said Fourteenth Amendment to the facts of this case, which if applied correctly would require a different judgment from that rendered.

Conclusion.

Upon each and every ground of this motion, individually and taken together, movant submits that a rehearing should be granted and the decision reversed.

Respectfully submitted,

Thurmond, Hester, Jolles &
McElmurray,

By: Cornelius B. Thurmond, Jr.,

Post Office Address:

1400 Southern Finance Building,
Augusta, Georgia,

and

Thomas M. Odom,

Post Office Address:

P. O. Box 928,
Millen, Georgia,

Attorneys for Appellant.

In the Supreme Court of the State of Georgia.

Geneva R. Marshall,
Appellant,
vs.
Elvie Russell, Individually, et al.,
Appellees.
Case No. 23,576.

I, Cornelius B. Thurmond, Jr., of the Law Firm of Thurmond, Hester, Joles and McElmurray, Counsel of Record for Geneva R. Marshall, Movant, certify that upon careful examination of the opinion of the Court in the above and foregoing case, I believe the facts and decisions pointed out in the foregoing Motion for Rehearing have

been overlooked or that such provisions of law or controlling authority have been erroneously construed or misapplied.

This 17th day of September, 1966.

Cornelius B. Thurmond, Jr.

I do hereby certify that I have served a copy of the within and foregoing Motion for Rehearing upon the following attorneys of record for the appellees noted, by mailing copies to them at their post offices addressed indicated, with sufficient postage affixed, this 17th day of September, 1966:

1. George W. Fryhofer, Attorney of Record for appellee, Oliver O. Russell, 114 East Sixth Street, Waynesboro, Georgia;

2. R. U. Hardin, Waynesboro, Georgia, Attorney of Record for appellees Ruth Russell Howard and Everett Russell;

3. E. D. Fulcher, 520 Greene Street, Augusta, Georgia, Attorney of Record for appellee Elvie Russell, individually; and,

4. John D. Capers, Marion Building, Augusta, Georgia, Attorney of Record for appellee Elvie Russell in her representative capacity as Executrix of the Estate of Q. V. Russell, deceased.

Cornelius B. Thurmond, Jr.
Attorney for Appellant.

ORDER.

23576.

Supreme Court of Georgia.

Atlanta, September 22, 1966.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: Geneva R. Marshall v. Elvie Russell, Extrx., et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Certificate.

Supreme Court of the State of Georgia.

Clerk's Office, Atlanta, November 8, 1966.

I hereby certify that the foregoing pages, consecutively numbered 1 through 108, hereto attached, contain a true and complete copy of the entire record on appeal in Case No. 23576, Geneva R. Marshall v. Elvie Russell, Extrx., et al., as appears from the records and files of this office.

Witness my signature and the seal of the said court hereto affixed this 8th day of November, 1966.

(Seal) Henry H. Cobb, Clerk.